PROPOSED REFORM OF THE 8(A) PROGRAM THROUGH H.R. 3994, THE ENTREPRENEUR DEVELOPMENT PROGRAM ACT OF 1996

Y 4.SM 1:104-92

Proposed Reform of the 8(A) Program...

HEARING

BEFORE THE

COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

WASHINGTON, DC, SEPTEMBER 18, 1996

Printed for the use of the Committee on Small Business

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CONTENTS

Page

Hearing held on September 18, 1996 1

WITNESSES

WEDNESDAY, SEPTEMBER 18, 1996

Banerjee, Tapan, founder and President, TapanAm and Associates 54
England-Joseph, Judy, Director of Housing and Community Development Issues, General Accounting Office, Washington, DC 9
Farinha, Steven, President, Farinha, Inc. 57
Ford, Brenda, President, Ford & Associates, Silver Spring, Maryland 44
La Noue, George R., Director, Policy Sciences, University of Maryland-Baltimore County, Policy Sciences Graduate Program, Baltimore, Maryland 48
Lader, Philip, Hon., Administrator, U.S. Small Business Administration, Washington, DC, accompanied by Calvin Jenkins, Associate Administrator for Minority Enterprise Development; John Spotila, General Counsel; and Hugh Wright, Assistant District Director for Minority Enterprise Development, Washington District Office 6
Offord, Jim, Retired Contract Specialist, Silver Spring, Maryland 46
Rosen, Jeffrey, Associate Professor, George Washington University School of Law and Legal Affairs Editor, The New Republic, Washington, DC 52
Stewart-Veal, Shirley A., President and Founder, SAS, General Construction Contractor, Herndon, VA 43

APPENDIX

Opening statements:
- Clayton, Hon. Eva 73
- Fields, Hon. Cleo 78
- Flake, Hon. Floyd H. 80
- LaFalce, Hon. John J 83
- Meyers, Hon. Jan 87
- Millender-McDonald, Hon. Juanita 94
- Poshard, Hon. Glenn 96
- Velázquez, Hon. Nydia 98

Prepared statements:
- Banerjee, Tapan 105
- England-Joseph, Judy 108
- Farinha, Steven 128
- Ford, Brenda 132
- La Noue, George R. 137
- Lader Philip 178
- Offord, Jim 201
- Rosen, Jeffrey 204
- Stewart-Veal, Shirley A. 216

Additional material:
- Questions to Mr. Lader from Chair Meyers 218
- Answers to questions from Mr. Lader 220

PROPOSED REFORM OF THE 8(A) PROGRAM THROUGH H.R. 3994, THE ENTREPRENEUR DEVELOPMENT PROGRAM ACT OF 1996

WEDNESDAY, SEPTEMBER 18, 1996

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m., in room 2359, Rayburn House Office Building, Hon. Jan Meyers (Chair of the Committee) presiding.

Chair MEYERS. The meeting will come to order. This morning's meeting is about the 8(a) set-aside program in the Small Business Administration. I am going to try to limit my opening remarks to about 5 minutes, and I hope Mr. LaFalce can do the same. We are going to try to get right into the program here, because there are a lot of you in attendance and we have a lot of witnesses to be heard from.

The Small Business Administration is a small but mighty Agency. It is a half-a-billion-dollar Agency, a little over that. In most of the Agencies in this Government, one program will spend $6 or $8 billion, and here we have this little Agency expending about half a billion dollars for small business.

Since I have been Chair of the Committee, we have really tried to emphasize the programs that I believe, and I think many of the Committee members believe, are of tremendous importance to all small business; the loan programs, the advocacy program, and the SBDC Programs. Now, here we have a program that is of dubious value that is losing us $1.5 billion a year. Let me document that a little bit. Both the part about dubious value and the part about $1.5 billion a year.

The 8(a) Program has failed as a bootstrap program to help fledgling minority businesses and has become a rich-get-richer program for contractors inside the DC beltway. The GAO reported that less than 4 percent of 8(a) firms emerged from the program as "competitive businesses." Many see the program as an end in itself.

As of September 1995, the SBA has never "graduated" an 8(a) firm because it had met the goals and objectives set forth in its business plan. The top 50 firms, 1 percent of the participants, most of which are located in and around Washington, DC, received 25 percent of the contracts, $1.1 billion in fiscal year 1994. Over half the firms certified in 8(a) in fiscal year 1994 never got a single contract.

One can be a millionaire and still be in the 8(a) Program as the equity in your house and in your business does not count toward the $750,000 allowable limit on personal wealth.

Furthermore, the SBA Inspector General's Office found that SBA miscalculates net worth and often does not consider the spouse's wealth.

The 8(a) Program is riddled with fraud and abuse even after three congressional attempts to reform it. In 1978, 1980, and in 1988, Congress adopted measures to clarify 8(a)'s intent and to reform SBA's administration of the program, emphasizing business development and not contracts.

Today, the same problems exist. Firms leave the program without achieving self-sufficiency, most of the program's benefits accrue to those who least need assistance, and poor management of the program by SBA continues.

The 8(a) Program is no longer necessary. Prior to the adoption of the Federal Acquisition Streamlining Act (FASA), 8(a) was the only government-wide procurement set-aside program for minorities. A few Agencies had specific Federal procurement set-aside programs for minority-owned small businesses to help meet the government-wide minority contracting goal of 5 percent.

The largest was DOD's 1207 Program, which allowed DOD procurement officers to use set-asides and bid preferences to meet their 5 percent goal.

In 1994, Congress passed FASA, which took those set-asides and bid preferences used in the 1207 Program government-wide. So, essentially, I see 8(a) now as a duplicative program.

The 8(a) Program wastes money through its reliance on sole-source contracting. In 1994, less than 9 percent of 8(a) contracts were competitively bid among 8(a) participants. Agencies have found ways around the requirement that all contracts over $3 million must be competed among 8(a) firms.

Competition, we know from testimony before this Committee and from government studies, saves an estimated 25 percent on Government contracts. That is, if a contract is bid, you are probably going to save 25 percent at a minimum, maybe more, but certainly 25 percent.

At the program's current level of about $6 billion in contracts a year, approximately $1.5 billion could be saved simply by going to competitive bidding.

The GAO found that 8(a) contracts for commercially available computer hardware were on the average 18 percent more costly than those contracts awarded through competitive bidding.

Finally, the personnel alone just to administer this program costs between $20 and $30 million a year.

I appreciate all of your being here. I know how strongly some of you feel about this. But I think it is time that we talk about doing something to this program that will really resolve some of these problems.

Let me say to my colleagues, I did not come to Congress to eliminate programs or to protect programs embraced by special interests. But when a program fails to show ability to achieve its goal over the course of 18 years, I know that Congress has the responsibility to act. It is for that reason that I introduced H.R. 3994, the

Entrepreneur Development Program Act of 1996, which would sunset the 8(a) Program's predominantly sole-source contracting arm, while retaining and broadening access to its established counseling and business planning outreach elements.

This approach would end, once and for all, the contracting shenanigans that the SBA and the participating Agencies have engaged in to "game" the system and funnel billions of dollars to beltway insiders. It also would focus valuable business development assistance to the struggling bottom tier of small businesses whose proprietors aspire to success rather than conspire to hide it.

I appreciate your being here. At this point I yield to Mr. LaFalce.

[Chair Meyers' statement may be found in the appendix.]

Mr. LAFALCE. Thank you very much, Madam Chairman. I have an opening statement. I ask unanimous consent to put it in the record.

Chairman MEYERS. Without objection.

[Mr. LaFalce's statement may be found in the appendix.]

Mr. LAFALCE. I also have a letter from a former member of the Small Business Committee and now the President of the NAACP, Mr. Mfume, and I would ask unanimous consent to put his letter in the record.

Chairman MEYERS. Without objection.

[The information may be found in the appendix.]

Mr. LAFALCE. Madam Chairman, because of the seriousness with which we take this hearing, I requested that the leadership fill the vacancies that exist on the Small Business Committee for the duration of this Congress. So, I would like to welcome, not everyone is present, but in any event, we have four new members of the Small Business Committee on our side of the aisle, Representatives Maxine Waters, Eleanor Holmes Norton, Jim Clyburn, and Xavier Becerra. I would welcome them to the Small Business Committee and whatever deliberations we will be having this year.

Having said that, let me make a few statements, Madam Chairman. Of course it is always appropriate to have a congressional hearing on a governmental program. But one has to look at the context of the hearing to determine whether or not it is appropriate or inappropriate in those circumstances. The 8(a) Program was one of the affirmative action efforts that at the beginning of this Congress the leadership of your party, and both sides of the aisle, Speaker Gingrich and then Senate Majority Leader Robert Dole, had under review a consideration for repeal.

As a matter of fact, at the beginning of this Congress, Senator Dole requested an examination of the Library of Congress of all possible affirmative action programs. It appeared for quite a period of time that a wholesale onslaught was going to be made against them.

Subsequent to that, we saw reports in the paper, and I am thinking of a few months or so ago, well, they are not going to proceed now, given the political context, except with the 8(a) Program. They will move to repeal the 8(a) Program.

You introduced a bill just before we recessed. I have forgotten whether it was the last day or July or the first or second day of August of this year, and then about 1 or 2 weeks ago, we heard word that there would be a hearing and a markup of your bill the

next day, approximately a week and a half or so before Congress was scheduled to adjourn.

I tell you, this was not received very well at all by the membership on our side. I don't know if it is still your intent to go ahead with the markup of your bill or not.

I think it is important to reiterate certain facts. The 8(a) Program was created in response to a tragic reality of American life, and that is the inability of some individuals to participate in our economy simply because of who they are.

I do not believe that programs like 8(a) have outlived their usefulness, because discriminatory treatment of certain Americans is not a thing of the past. It is small comfort to argue, as some do, that discrimination today is only subtle or unconscious or generational or situational. The fact remains that discrimination exists, both with respect to opportunity and with respect to effect.

It affects the individuals with whom one associates, the businesses one patronizes, perceptions of who can do the job, and the ability to access capital on a fair and equitable basis. In other words, all the aspects of doing business.

The 8(a) Program seeks to give firms a chance to rise above discriminatory barriers, with the hope that given this opportunity to develop, they will become competitive, viable firms in the open marketplace.

Historically, there was some confusion as to whether the 8(a) Program was simply a business set-aside program or whether it was, in fact, a business development program. We settled that issue in the 1988 legislation. We clearly said it is a business development program and should be viewed as such and implemented as such, et cetera.

Implementation has not always been what many of us would desire, and perhaps further improvements need to be made, both in the implementation and in the law. But improvements, not de facto repeal.

We clearly said, too, when it comes to certain dollar amounts, these contracts should be competitively bid, that competition is of the essence of business development. We clearly said legislatively that 8(a) contractors should be weaned off of the contracts, too, as they proceed through the program, and we put a time certain on their duration within it. Before you could stay in the program almost endlessly, and we said in the 8(a) legislation from beginning to end, 9 years is it. You must either graduate successfully or you flunk at the end of that period of time.

Now, so-called evidence is endlessly trotted out to show how flawed this program is. Often cited is the view that too many contracts go to firms in too few geographic locations. Well, I certainly think that merits examination.

The 1988 legislation mandated by law there should be the maximum possible geographic distribution of these contracts whenever possible, but there are certain contracts that are national in nature as opposed to local in nature. No other Federal program is criticized because of where private sector firms choose to locate.

We have buzz words such as Silicone Valley, Route 128. They have come into the English language based on the tendency of firms to collocate for whatever business rationale drives them.

Other examples include the concentration of financial services in New York and North Carolina, textiles and carpets in the Carolinas. I could go on and on.

Harvard Business School Professor Michael Porter has coined the term "clustering" for this tendency of like firms to collocate. He believes it enhances competition.

We also within this Congress were faced with the specter of Adarand, and the administration has done a thorough review of every affirmative action program to see if it complies with the structures of Adarand.

In their judgment, and I think the judgment of almost every legal scholar that I am aware of, there could be some exceptions, I suppose, but if any affirmative action program is able to stand up to the constraints of Adarand, it is the 8(a) Program. In large part I believe because it is a business development program, competitively bid, et cetera, except for your small business contracts.

Are there abuses? To be sure, in every program. This Committee briefly preliminarily examined one abuse that arose in your great State of Kansas, Madam Chairman. It involved a Kansas 8(a) firm called EDP, which received a $30 million contract for food processing. During my chairmanship, our Committee referred this matter to the Department of Justice, the FBI, the SBA's Inspector General, for follow-up regarding the possible illegal benefit from this contract that accrued to several people, including individuals with extremely close ties to former Senator Robert Dole.

Indeed, what apparently set this contract award in motion for EDP was a phone call from former Senator Dole to the then Administrator of the SBA. President Bush's administration did not act on the information we referred, and the matter largely dropped out of the public eye recently. However, a key player in this drama has dropped his previous wall of silence and may now be willing to testify before the Committee as part of this hearing on the 8(a) Program.

We certainly expect the Chair would work with us to develop the necessary information to answer the previously unanswered questions.

Madam Chairman, with that, I will conclude my remarks.

Chairman MEYERS. Thank you, Mr. LaFalce. I am going to quote, if I may, a couple of lines that you said on the floor in 1988. This was after your last thorough investigation of this event, and you said "one preliminary but important point must be made: The initial reason why this case received so much national attention is because several of the individuals associated with this contract also have had close personal and working relationships with Senator Robert Dole of Kansas. In that regard, I want it understood," still quoting you, "that based upon all of the materials the Committee has reviewed and interviews with numerous individuals, I have found nothing that suggests Bob Dole was personally involved in any questionable event or occurrence."

I think it is really important to say that, because I think starting off this hearing with that kind of innuendo is wrong.

Mr. LAFALCE. Madam Chairman?

Chair MEYERS. I recognize Mr. Phillip Lader.

Mr. LAFALCE. Madam Chairman, since you have commented on that report and not on the memo that I sent out the day after that report with new information that came from the Chief of Staff to the then Administrator of the SBA, which prompted me to forward the information to the Department of Justice and the FBI, I think I should at least be able to make reference to that, Madam Chairman.

Chair MEYERS. We can certainly do that at a later time. I recognize at this point——

Mr. LAFALCE. Madam Chairman. Madam Chairman.

Chair MEYERS. You had your opportunity, Mr. LaFalce.

Mr. LAFALCE. You reputed my opening statement.

Chair MEYERS. I certainly did.

Mr. LAFALCE. With the findings I made on day one, but then because of those findings, we received a phone call that would have contradicted that interpretation, contradicted that information, and you omit reference to that, despite the fact that I sent a memo to everyone advising them of the new information.

I ask unanimous consent, Madam Chairman, to put in my memorandum dated subsequent to my statement in the Congressional Record, dated February 3, 1988, that was given out to the public at large, an addendum to the preliminary investigation on EDP Enterprises.

Chair MEYERS. We can certainly enter it into the record, Mr. LaFalce. I think your statement on the floor stands.

Mr. POSHARD. Madam Chair, may I ask unanimous consent in the interest of time that any Members who have opening statements may submit those for the record?

Chair MEYERS. Thank you. We will do that without objection.

[The statements may be found in the appendix.]

Chair MEYERS. I recognize Mr. Lader.

TESTIMONY OF HON. PHILIP LADER, ADMINISTRATOR, U.S. SMALL BUSINESS ADMINISTRATION, WASHINGTON, DC; ACCOMPANIED BY CALVIN JENKINS, ASSOCIATE ADMINISTRATOR FOR MINORITY ENTERPRISE DEVELOPMENT, JOHN SPOTILA, GENERAL COUNSEL, AND HUGH WRIGHT, ASSISTANT DISTRICT DIRECTOR FOR MINORITY ENTERPRISE DEVELOPMENT, WASHINGTON DISTRICT OFFICE

Mr. LADER. Thank you for the opportunity to be with you today, Madam Chairman. I am accompanied by Calvin Jenkins, to my left, the Associate Administrator for Minority Enterprise Development, John Spotila, the SBA's General Counsel and our Agency's lead liaison with the Justice Department regarding this program, and Hugh Wright, the SBA's Washington District Office's Assistant District Director for Minority Enterprise Development.

Let me also introduce Ronald Hobson, SBA's newly appointed Associate Deputy Administrator for Government Contracting and Minority Enterprise Development, who joins us from Signet Bank.

Madam Chairman, the Clinton administration is committed to the Dole goal of expanding opportunity for all Americans to participate in our free enterprise system and in Federal procurement. The President has strongly stated his commitment to mend, not end, Federal affirmative action programs.

To achieve this goal, SBA has sought to strengthen and improve the 8(a) Program as a business development program, designed to help eligible small businesses which are socially and economically disadvantaged as defined by statute reach self-sufficiency and competitive viability.

This was the program's intent when it was established in the Nixon administration, business development, not a handout, not a giveaway. Nearly 3 years ago today my predecessor asserted before you SBA's intent to improve the 8(a) Program, and I am pleased to tell you that significant improvements have been made.

A new comprehensive management information system is in place, talked about for 10 years. Annual reviews of program participants have been done. We have reduced the application processing time. We have refocused the 7(a) and technical assistance through expansion of technical education.

We have reduced the paperwork burden by eliminating quarterly financing reporting, and accelerated the termination of ineligible firms. Moreover, the Justice Department is proposing other changes to this program.

There are some particularly interesting points I should mention as a prefatory note. Currently, 8(a) firms directly employ more than $157,000 people. More than 80 percent of all 8(a) firms are located outside the Washington, DC area, and these firms receive about 75 percent of the 8(a) contract awards. There is another frequent though inaccurate criticism of the program.

The average net worth of program entrants is $60,000, exclusive of residence and ownership in the business. I would ask that my written testimony be admitted and therein you will find a variety of success stories from the program. But given these success stories, the question can be asked, as to whether the program's purpose has been fulfilled.

The most recent data shows that minority-owned businesses comprise 8.8 percent of the total business population, while minorities comprise 26 percent of the general population.

The participation of minority-owned firms in Federal procurement remains even smaller: The aggregate minority-owned business participation in Federal contracting amounted to only $11.2 billion, representing 5.5 percent of total procurement in 1995. Total contract dollars awarded through the 8(a) Program represented approximately $6.4 billion, or 3.1 percent of Federal contracting, about half of all the minority business participation in Federal procurement.

In other words, had 8(a) contracting opportunities not been available, minority-owned businesses might have received 2.4 percent of Federal procurement dollars. You can understand what I mean therefore when we say that as a Nation, we still have a long way to go in opening small business opportunities for all Americans: But this dramatic need should not excuse the 8(a) Program from improvement.

As I mentioned previously, SBA has meaningfully addressed concerns placed by this Committee in other reports. Our efforts have not been perfect. The work is not yet done, but we can demonstrate that the 8(a) Program is being mended, often in a very profound

way that is consistent both with the program's objectives and the best interests of American taxpayers.

There are certain specifications about these reforms I want to share with you. Eighty-four percent of all portfolio firms were reviewed last year as compared to only 57 percent the previous year, and we expect all to be reviewed this year. A newly implemented management information system is now a reality. To increase the number of contracts available for competition, the indefinite delivery-indefinite quantity, ID–IQ, contract loophole has been closed.

Our processing, which averaged 203 days, today is 90 days, and nonsole-source contracts are increasing at a faster pace than all minority contracts. Amongst those exiting the program from 1992 to 1995, 52 percent, Madam Chairman, reported that they were now independently operational as viable businesses.

As to H.R. 3994, the Clinton administration strongly opposes this bill, because it would eliminate the 8(a) contracting program and the 7(j) business development training. Countless disadvantaged small business owners would be hurt. The economic potential of a critical segment of America's population would have a significantly less chance of being realized.

SBA would recommend that the President veto any legislation that passes the Congress which is not consistent with this policy of mending, not ending affirmative action. The bill does not refer to any data, analyses or other evidence to demonstrate that the problems which led Presidents Nixon and Reagan to establish and then renew the 8(a) Program have now been overcome.

Under H.R. 3994, the businesses eligible for the substitute services are the smallest businesses, and these very small firms are currently eligible for all of SBA's other programs.

As to the sole-source issue, let me put this in perspective. Two large businesses, each received a single sole-source contract last year that was approximately equal to the total value of all 85 contract awards put together. Last year, 8(a) firms received about $2.5 billion in new sole-source awards. There was about $2 billion additional of renewal activity. That is $4.5 billion. But by comparison, there were $63 billion of sole-source awards throughout the Government.

There is also a misunderstanding about the question of competition. Let me again emphasize that total 8(a) contract dollars of approximately $6.4 billion represented only 3.1 percent of the total Federal contracts. Only half of the 8(a) Program participants, as you said, actually received one contract. Self-marketing and negotiation of reasonable prices were required in every instance, and all receiving contracts were required to perform successfully in the provision of goods and services.

The SBA, I will conclude, believes that the 8(a) Program is necessary, but it does not condone any past abuses that may have occurred. We have acted to correct them, and all of the aforementioned reforms and the upcoming Justice Department proposals demonstrate our administration's commitment. We recommend that the forthcoming Justice Department proposals be given a chance to work.

We need to continue to improve this program. But while such great disparities continue in the levels of Federal procurement, the program, I respectfully submit, should not be eliminated.

[Mr. Lader's statement may be found in the appendix.]

Chair MEYERS. Thank you, Mr. Lader. I would like to state that Mr. Spotila and Mr. Jenkins accompanied Mr. Lader today, and at this time I would recognize Ms. Judy England-Joseph, Director of Housing and Community Development Issues of the General Accounting Office.

TESTIMONY OF JUDY ENGLAND-JOSEPH, DIRECTOR OF HOUSING AND COMMUNITY DEVELOPMENT ISSUES, GENERAL ACCOUNTING OFFICE, WASHINGTON, DC

Ms. ENGLAND-JOSEPH. Thank you. Thank you, Madam Chair and Members. I would like to summarize my remarks and submit the full statement for the record. I am here today to discuss the Small Business Administration's 8(a) Minority Business Development Program. Our reports and testimony over the years have chronicled the difficulties that SBA has had in implementing many of the changes to the 8(a) Program mandated by the Congress in the Business Opportunity Development Reform Act of 1988 and subsequent amendments.

My testimony today focuses on SBA's progress in implementing several changes that are of special interest to the Committee and that are designed to make the 8(a) Program an effective business development program.

These are requiring that 8(a) contracts with a large dollar value be awarded competitively, distributing 8(a) contracts so that a larger number of firms receive them, ensuring that firms rely less on 8(a) contracts by increasing their business that does not come simply through the 8(a) Program, and finally, graduating firms from the program that demonstrate that they can survive without 8(a) contracts.

My statement is based primarily on information that we obtained from SBA through fiscal year 1995, the latest fiscal year for which complete data were available. Most of this data came directly from SBA's automated system. Because of the limited time that was available to prepare for this hearing, we were not able to independently verify the accuracy of this data.

In summary, while the dollar amount of 8(a) contracts awarded competitively during fiscal year 1995 increased over fiscal year 1994, the percentage of contract dollars awarded competitively remained at about 19 percent. It is important to note, however, that as of August 1995, SBA regulations now require Agencies to consider the full value of the contract, when determining whether an ID–IQ contract should be competed. So, we may see a change in the number of contracts competed in fiscal year 1996.

The concentration of 8(a) Program contract dollars in a relatively few number of firms that occurred in prior years also continued in fiscal year 1995, with less than 1 percent of the firms receiving about 25 percent of all contract dollars. This concentration limits the developmental opportunities available to other disadvantaged firms.

In 1995, DOD and VA agreed with SBA to give special emphasis to 8(a) firms that had never received contracts. SBA does not have data on this activity to date, but, again, we may see some changes in the concentration of business activity in 1996 as a result of the decisions of DOD and VA.

During fiscal year 1995, a larger percentage of the firms in their final program year achieved the required level of non8(a) business than we reported to you in April 1995 — 58 percent compared to 37 percent.

In 1995, 28 percent of the firms in the fifth through the ninth or final year of the program did not meet the minimum requirements for non8(a) business.

Actions considered by SBA, but not implemented could have significantly affected this issue and should those actions be implemented into the future, it is quite possible that we might see an increase in the number of firms that can meet the minimum level of non-8(a) activity.

Finally, during fiscal year 1995, three firms, among some 6,000 firms, were graduated from the program because SBA determined that the firms had met their developmental goals and were able to compete in the marketplace without further 8(a) assistance. According to SBA, these were the first graduations in the program's history.

It is important to add that 160 firms were terminated for various reasons, including the failure to comply with program requirements, or they were no longer in business, and an additional 250 firms left the program because either their program terms had expired or they simply chose to leave the program.

In May 1995, SBA established requirements for its field staff to evaluate the financial condition of 8(a) firms and to determine whether firms were ready to graduate from the program. An evaluation done by SBA in February 1996 of the annual reviews completed by field staff highlighted some serious weaknesses of the staff.

Financial analysis was very poor and the staff did not fully understand the concepts of economic disadvantage, financial conditions of the firms, and access to capital. In addition, comparisons of the financial condition of 8(a) firms to non-8(a) firms in similar business lines was limited.

While SBA plans some training later this year, the issue of staff skills and abilities is a critical one that could undermine many of the efforts that SBA is pursuing in its efforts to improve program management.

In closing, while the 8(a) Program has not yet achieved key changes mandated by the Congress, SBA has taken actions during the past year that indicate steps in the right direction.

Two areas, however, are of continuing concern to GAO. Those are the need to collect data to better measure the overall impact of the 8(a) Program, and the need to improve the skills and abilities of SBA staff who are responsible for assessing the financial condition and competitiveness of the 8(a) firms.

That concludes my remarks, Madam Chairman, and I would be happy to answer any questions or comments other Members may have.

[Ms. England-Joseph's statement may be found in the appendix.]

Chair MEYERS. Thank you very much, Ms. England-Joseph.

Our next witness is Mr. Hugh Wright. Mr. Wright, as I understand it, you are going to respond to questions rather than giving testimony; is that correct?

Mr. WRIGHT. That is correct.

Chair MEYERS. All right. Then we are ready at this time to have questions from our Members. We will be limited as to time, so we will use the lights. I will start by asking a very short question.

Is there any reason why we could not bid among minority firms those who desire 8(a) contracts?

Mr. LADER. In the interest of time, let me ask Mr. Jenkins, who manages the program, to respond. I might have a postscript.

Mr. JENKINS. As Administrator Lader mentioned earlier, in fact there is competition within the 8(a) Program. Sole-source contracting that takes place within the 8(a) Program is, in fact, itself competition. There is informal competition going on every single procurement.

Chair MEYERS. I don't know that informal competition is the same as a bid, Mr. Jenkins. I hear this over and over and over again, that we have informal competition. That is not a bid for a program.

Mr. JENKINS. Exactly right. The competition does not meet the same requirement of the Federal acquisition regulation, but, in fact, that competition that goes on is much more difficult than the competition that takes place as outlined by the Federal acquisition regulation.

These first must show proof to a contracting officer that they have fair and reasonable prices and that the product and services meet or exceed any that are offered by anyone else outside of the program.

Mr. LADER. Postscript, Madam Chairman. The same point that could be raised as you did in your opening statement as a criticism of the program I think is partially responsive. Only half of the some 6,000 first admitted to the program last year received any contracts. That demonstrates that within the program itself there is a competition for who gets contract awards.

I recognize the distinction you are raising between a bid and this type of informal competition, but I do want to emphasize, as Mr. Jenkins did, that there is competition and a reasonable price is required for the contract to be awarded.

Chair MEYERS. I think women also have about 2 percent, maybe less than that, of Federal contracts, and yet they are specifically barred from participating in the 8(a) Program. I would like you to comment on that.

Mr. JENKINS. Women are not barred from the program. I think it is very important to make it clear.

Chair MEYERS. But, Mr. Jenkins, of the thousands that have been involved since the program began 18 years ago, I think there have been 16 Caucasian women, and they had to go to court to get a contract, and there have been some 400 minority women.

Now, that sounds like a bar to me.

Mr. JENKINS. Well, I think it is important to realize, to actually review the statute, the statute indicates that the program is open to all Americans.

Chair MEYERS. I have trouble with the statute, yes.

Mr. JENKINS. But it is open to those that can demonstrate that they are socially and economically disadvantaged. Everyone that enters the program, no matter if they are part of the presumed group or not, must have demonstrated economic disadvantage. The test for social disadvantage is that which one has to show, long-standing of discrimination, there are no bars.

Chair MEYERS. Except that a minority is automatically considered socially disadvantaged, and no one else is. If you are other than a minority, you have to go to court to get certified. So, actually there is a bar to participation.

Now, the bar to minority women I think is just because, I don't know whether it is just the "old boy" network. I don't know whether that is changing really, but the number of minority women involved, based on or compared to the number overall, is very small.

Mr. LADER. A quick point. You correctly state what may be a policy difference regarding eligibility for entrance in the program. But you are very well aware of the SBA's strong efforts on behalf of women in our cornerstone 7(a) Program, as you know, with more than $7 billion of Government guaranteed loans last year. We had an 86 percent increase of loans to women-owned businesses.

Chair MEYERS. I think you have done a good job in that, Mr. Lader. It is just that there are no sole-source set-asides for women, and that is the point that I was making.

Mr. LADER. I am advised there are today more than 1,000 of the 6,000 firms in the program that are women-owned.

Chair MEYERS. That is a change, but how many have had contracts? At the time that I looked, in the entire history of the program, only 400 minority women had had a contract.

Mr. LADER. Though I am not at liberty to go into what the Justice Department may be proposing, I expect that you will see in the Justice Department proposals some changes that will facilitate women's entry into the 8(a) Program.

Chair MEYERS. That would be welcome news, but I would think the main problem with 8(a) is the fact that it defies *Adarand* and it is sole-sourced. So, including women might just exacerbate the program.

I recognize Mr. LaFalce.

Mr. LAFALCE. Thank you very much. Pursuant to the provisions of Rule XI 2(j)1, in connection with the hearing on proposed reform of the 8(a) Program through H.R. 3994, we, the undersigned, a majority of the Minority party members of the Small Business Committee, request that you designate a day for the Minority to call witnesses to testify with respect to that matter. I would like to transmit to you this letter signed by a majority of the Minority Members.

Chair MEYERS. Thank you. I appreciate this. I do think that we offered the opportunity for Minority Members to present witnesses, and I also think that Mr. Lader has done a very good job of stating your position.

Out of two witnesses on the first panel, one of them certainly has been stating your position in this, Mr. LaFalce.

Mr. LAFALCE. There is absolutely no question that under the rules we are entitled to our own separate day of hearings. That is point Number 1. Point Number 2, we submitted about a half dozen witnesses. We were confined to two witnesses. We were also not given the names of the witnesses you wished to propose. We were also told that our witnesses would have to be on a panel called panel 4, et cetera.

In any event, aside from the unfair treatment you have given the Minority with respect to this hearing, the absolute legal right we have under House Rules to our own separate days of hearings has been transmitted to you.

Chair MEYERS. We can discuss this another time, Mr. LaFalce. I will certainly take it under consideration. However, we received no names from you for witnesses, none.

Mr. LAFALCE. I think it is not necessary for me to comment on that, Madam Chairman.

Let me go on.

Chair MEYERS. I think we are resolving this conflict, but we received no names from you. I am sorry, Mr. LaFalce.

Let's proceed with the hearing. We will take this under consideration.

Ms. VELÁZQUEZ. Madam Chairman, I would like to refresh your memory. I personally sent a letter to you with a recommendation of four witnesses for this hearing.

Chair MEYERS. I received nothing from Mr. LaFalce, and I am not aware of your communication.

Ms. VELÁZQUEZ. I am a member of this Committee.

Chair MEYERS. Let us proceed, Mr. LaFalce.

Mr. BECERRA. Madam Chairman, parliamentary inquiry. I believe the Ranking Member has stated under the rules that the Minority is entitled to a hearing once a majority of the Minority Members requests one. I understand that the Chairwoman said that she would take that under consideration.

I would like to know if under the rules, this is something that can be ruled on at this stage since the request has been made?

Chair MEYERS. I have no objection to having another hearing. However, I will say that this is the third hearing we have had on 8(a) in the 104th Congress, and it is not like it is a brand new subject or that I have avoided it or tried to avoid your witnesses.

The only question that I have is in the remaining week that we are here, if we can schedule a hearing, we will do it. That is why I said I would take it under advisement. I have no objection to having further hearings.

Mr. BECERRA. Further parliamentary inquiry. Perhaps the Parliamentarian can advise us. I don't have a copy of the rules for the Committee before me, but I would like to know exactly what those rules state with regard to this particular request. Can it be ruled on at a later point in time or is it up to the discretion of the Chair to determine if a hearing will be held? Or is it a requirement that is mandatory once a hearing has been requested by a majority of the Minority Members?

Chair MEYERS. I have stated that I have no objection to having another hearing. I will attempt to do so. I do not know whether such a thing is possible in the remaining week.

Mr. BECERRA. Let me further my parliamentary inquiry. It appears that the Chairwoman is saying that perhaps because of time we may be constrained in hosting another hearing. What I would like to know is: Do the rules require us to hold another hearing, given that the request has been made by a majority of the Minority Members?

Chair MEYERS. Let us resolve this at a later time and go on with the questioning, because we have so many witnesses to be heard, we will resolve this before we adjourn this morning.

Mr. BECERRA. I hate to continue to intercede, but——

Chair MEYERS. The gentleman is out of order. I have said before 12 o'clock we will resolve this.

Mr. BECERRA. That is fine.

Mr. FIELDS. Parliamentary inquiry, Madam Chairman.

Chair MEYERS. You are recognized for a parliamentary inquiry only, because we have a lot of witnesses this morning.

Mr. FIELDS. I understand. I am interested in hearing them. But I would like to know what does the rule provide, and I am sure we have counsel here who could read the rule.

Chair MEYERS. That is what I am going to determine. I would like to move forward at this time.

Mr. FIELDS. I understand. But parliamentary inquiry, I wanted to know as a member of this Committee, if I am operating under the rulings I want to know what they are.

Chair MEYERS. You will be operating under the rules, I think, when we determine what we can do and whether we can set a hearing date right at this time.

Mr. FIELDS. I understand that, Madam Chairman. I don't want to be rude, but if we have counsel here with a rule book, then I see nothing at all wrong with the counsel reading the rule to the Members.

Chair MEYERS. I am saying, Mr. Fields, let us move forward. We are getting the rule book and we will see and a determination will be made very shortly.

Mr. FIELDS. If the gentlewoman is saying we are going to wait until the rule book arrives, I would agree with that.

Chair MEYERS. No, we are not. We are going to move forward. I would like to have the Committee give some attention to the additional witnesses that are with us. We will move forward and resolve this as quickly as possible.

Questions, Mr. LaFalce.

Mr. LAFALCE. Thank you. Reference has been made to 8(a) contracts in the State of Kansas. I will tell you what I am interested in and what refreshed my recollection. A short while ago, perhaps a month, I was watching television, and a Nightline program was on, and the Nightline program happened to deal with a number of issues arising out of the State of Kansas, and some individuals were on that program, their names were mentioned, David Owen and Jim Palmer, and it refreshed my recollection that we had made an investigation of a 8(a) contract that was awarded to Mr. Palmer, a former Assistant of Senator Dole's, and we also discovered at that

time, too, that Mr. Owens, who recently got out of jail and has begun talking more now than he would in 1988——

Chair MEYERS. He was jailed on an unrelated charge.

Mr. LAFALCE. Yes, absolutely, but had been a recipient of a consulting contract from EDP, the 8(a) contract or, for approximately $170,000.

It was also revealed on this Nightline Program that Jim Palmer, who had never received an 8(a) contract before he got an almost $30 million award, was the individual who bought the real estate that was in the blind trust of Mrs. Dole. It was just an unusual convergence of circumstances, that this former assistant, who got this almost $30 million contract and gave Mr. Owen a consultantship of approximately $170,000, was then the one who bought this real estate.

I refreshed my recollection by looking through the file and found out that the information I had received subsequent to the preliminary investigation was replete with information which made me send this information to the Attorney General's office, to the FBI, saying it looks as if criminal activity took place here.

Now, that is not to say who was involved in this criminal activity. I certainly saw nothing that implicated Senator Dole in criminal activity, and said so. It certainly seemed as if criminal activity was involved. The Assistant Attorney General in charge of the Criminal Division, I rediscovered in looking over the file, was one William Weld, now Governor of the great State of Massachusetts. There was no follow-up on that.

Well, all these circumstances lead me to believe that this is something that should be looked at. Here we have a 8(a) contract or totally unqualified, no prior experience. It is a $30 million award. David Owen gets a consultant fee of about $170,000——

Chair MEYERS. You are proving my point, Mr. LaFalce.

Mr. LAFALCE. What is that point?

Chair MEYERS. The point is that this program is riddled with fraud and abuse.

Mr. LAFALCE. This is one we should investigate then, Madam Chairman.

Chair MEYERS. It is certainly one, and I will not defend EDP or John Palmer or Dave Owen, any of them. This was investigated by the Committee in 1988, investigated by the Inspector General at the same time, investigated by the FBI at the same time, and investigated by a Democrat Special Prosecutor appointed by the Attorney General of Kansas. No impropriety was found on Senator Dole's part, a fact that Mr. LaFalce made clear at the time, as did his staff investigator.

Are we to assume that all of these individuals, including the Minority staff, are either incompetent or corrupt? Mr. Owen, at the least, bent if not broke campaign finance laws and abused his status as the adviser to Elizabeth Dole's blind trust. Senator Dole was disgusted and betrayed by this, and now Owen is spreading his baseless charges to cover up his own problems.

He stole Mrs. Dole's money and tried to steal Bob Dole's good name. To mention this man is an appalling act, and I should think the Ranking Member would recall his own words of February 1988.

Mr. LAFALCE. There was new information, Madam Chairman, and I put out the new information. We also have new information regarding Mr. Palmer's purchase of the real estate that was in the blind trust. This is more than mere coincidence. I think it is deserving of a careful, impartial pursuit by the gentlewoman from Kansas.

Chair MEYERS. Your time is gone. May I recognize the gentleman from Maryland.

Mr. BARTLETT. Thank you very much, Madam Chairman. I am sorry I was late for the hearing. I was delayed because I went to a news conference, Feed the Children, Reverend Larry Jones.

While there, I was thinking of this hearing and noting the analogy between Feed the Children and what we are talking about here today. This Feed the Children Program is one that finds most of its recipients to be minorities, but the program does not discriminate. The program does not focus on a specific type of person. It focuses on need. I think that that should be the goal of any program, such as the one we are talking about today.

It should be a program that focuses on need, and I think that is where our Chairman would like to take us.

I have in front of me some statements relative to the 8(a) Program, and I just asked staff if the information I had could possibly be correct. In the history of the 8(a) Program, according to SBA, and this was verified, I understand, by GAO, that only 3 of over 6,000 participants have become self-sufficient and graduated from the program?

I was assured that that was correct. That is in 1995.

Mr. LADER. If it is appropriate, I will be pleased to respond.

Chair MEYERS. I will recognize Mr. Lader and then Ms. Joseph.

Mr. LADER. Congressman Bartlett, the factor of three may be accurate, but what you must recognize is that is not the determination of self-sufficiency or commercial viability. Firms leave the program for a variety of reasons throughout the 9-year spectrum. Many of them become commercially viable and leave. Many of them find that the benefits of the program were not what they expected to it to be. Many have not received contracts, since we said only half actually in the competition that goes on receives contracts. So, you are equating the number 3 as the formal graduation at the end of 9 years with commercial viability.

I would submit to you, sir, that is not an accurate representation.

Mr. BARTLETT. What are these three then? You admit there are three in a category. What are the three?

Mr. LADER. I can't tell you the names.

Mr. BARTLETT. I want to know not what specific companies. I want to know the characteristics of these three.

Mr. LADER. They would, the same characteristics, sir, as many of the firms that left the program earlier than the 9-year period or have chosen not to participate. Those are firms which have established a good mix between Government contracting and commercial businesses.

Those businesses which have developed the sufficient entrepreneurial, managerial skills that they are now satisfied to be outside the program, those are the criteria by which we would gauge business success, and that applies to a variety of firms, and you

should not limit it only to those that have formally graduated as such.

Chair MEYERS. If the gentleman would yield for a moment, I do think, however, that of the programs that exit or graduate, that only about half of them are still viable firms after a 3- or 4-year period.

Mr. LADER. Madam Chairman, you recognize, though, we are enjoying in the last several years a greater percentage of success of small businesses. That percentage may not be that different from the number of small businesses which generally succeed in the overall context.

Chair MEYERS. But considering that we have carried them along for 9 years and counseled with them, it seems to me that the figure should be going up, and it is going down.

We had 64 who were independently operational after a 4-year review in 1986, and now it is 52 percent.

Mr. LADER. Actually, the percentage of firms which are becoming commercially viable has been increasing. What we have to point out in this context, though, is that as we measure the viability of the firms, we have not been carrying them along. They have been admitted to the program to compete for contracts. They have counseling, but can have counseling outside the program through the small business development centers and other programs you champion. So, I don't think that is a valid comparison.

Chair MEYERS. Mrs. England-Joseph?

Ms. ENGLAND-JOSEPH. I want to be sure that we all understand what the three actually means and also what graduation means and what termination or exit really means.

When your staff spoke to you about the three, it is true that only three have graduated from that program. According to SBA, that means those three firms, throughout the time that they were involved in the program, had gotten to the point where SBA determined that the 8(a) and non-8(a) contracts the firms had received enabled the firms to leave the program and compete in the regular marketplace.

I would not agree with the word that only three left that were self-sustaining or successful in some way, because I think we have to really understand that there is very little data on which to understand success of firms that depart from the program.

One of the issues that we have raised with SBA is that the term "exited" or "departed" or "terminated", those terms are used as fairly broad terms to define a number of different situations when a firm departs. It can be because the firm no longer exists. It can be because the firm does not comply with or meet the requirements of the program.

Mr. LADER. Or successfully merged with another.

Ms. ENGLAND-JOSEPH. It can mean that the firm has more than felt they can compete successfully in the marketplace and no longer need 8(a) assistance and would like to go out on their own. That can be a choice at any time, or SBA can look at the data and determine that that firm is already competitive and does not need 8(a) support and should graduate from the program. So, it can be either voluntary or SBA can, in fact, move the firm out. So, there are a number of reasons why firms leave.

It is very difficult, given the data that are available today, to be able to point to empirical evidence. There is a lot of anecdotal evidence out there in terms of stories of success, but very little in terms of empirical evidence to show how many of the firms that in some way participated in the program, whether they were in for 1 year, 5 years, or the entire 9 years, whether there is a cause-effect relationship between the assistance they received in business development and technical assistance, and 8(a) contracts, whether that cause-effect relationship demonstrates when they depart, in whatever way, they are, in fact, successful in the marketplace.

I realize that is an evaluation issue in terms of data, but it is an important question when anyone is talking about what is going on in this program and why for several years now we have been saying that until we have that type of data, it is very difficult to be able to point to a great deal of success. But I also don't want to imply that it also suggests there has been no success at all.

Chair MEYERS. Thank you.

Mr. BARTLETT. I know the red light is on, but I have had a lot of help in consuming these 5 minutes. If I might ask just one additional exit question, it is my understanding — let me ask this as a question: Who established the guidelines for determining graduation? If that was SBA, then isn't it true that if your child in school had this level of achievement, ½ of 1 percent success rate, that you would understand an F-minus on the report card?

Ms. ENGLAND-JOSEPH. SBA did define what graduation means.

Mr. BARTLETT. By their own rules the program has been a monumental failure.

Ms. ENGLAND-JOSEPH. No, sir, at least I don't want to speak for SBA, but in my opinion, the data you are quoting is not accurate enough on which to base the issue of success. That is the difficulty I think everyone has on both sides. The data are just not there to overwhelmingly suggest one way or the other about this program.

Chair MEYERS. I believe that this 4-year survey, after exiting indicates that 52 percent were independently operational, and 45 percent had totally ceased operation.

Ms. ENGLAND-JOSEPH. Yes, ma'am. But for several years we have testified that we have concerns about that exit study, that annual study. The IG has issued reports regarding that study. It was and has been the only data available to date to determine what might be happening. But we have seen that it is extremely difficult to follow firms once they depart from the program.

Many firms are absorbed by others, many firms don't leave addresses, it is very hard to find them. So, when you use those statistics, it is very difficult to know whether you have an accurate base on which to make those percentages. It may be that those percentages are based on the respondents, but those respondents may be a much narrower part of the population than the whole. So, it could be quite misleading.

Chair MEYERS. Mr. Poshard?

Mr. POSHARD. Thank you, Madam Chairman. I would direct my questions to Administrator Lader. One of the concerns that I have is performance.

What data do we have to show how well 8(a) contractors perform compared to non8(a) contractors?

Mr. LADER. Let me ask Mr. Jenkins to respond as Program Manager.

Mr. JENKINS. The data we rely on is basically feedback from procurement Agencies that report the performance of firms, as well as our own district offices. We are required to maintain responsibility over a firm in terms of working with the Agencies in contract administration. When compared, 8(a) firms to non-8(a) firms, we notice that the percentage, the delinquency rate or termination rate, is literally less than 1 percent.

8(a) firms, when given the opportunity, perform as well or better in a lot of cases than the general population out there.

Mr. POSHARD. So we don't have any evidence in general, and sometimes I hear this as a concern expressed to me. We don't have any evidence to suggest that people are getting less qualitative production or work as a result of 8(a) contractors doing the job?

Mr. JENKINS. We get very few. Literally, when contracting officers select a firm to perform, they are valuing that firm on their technical capability. Technical capability, when you look at the Government procurement process, becomes a more key element.

Price sort of becomes secondary in nature. The question is can you get a quality product. Certainly, you can get a low price product. But then if the firm fails, you have to go back out and reprocure, and that drives the cost up. So, technical capability is key, and we have seen 8(a) firms that are performing outstanding.

Mr. POSHARD. For my concern at least, the performance is at the heart of what we are all about here. Other folks may be concerned about how we distribute the Federal dollars and the work and so on. I want to make sure that we are getting the biggest bang for our buck. You are telling me we are doing that, at least on an equal basis, and sometimes much better, than the non8(a) contractors.

Second question, Mr. Administrator: What about the sole-source contracts? I have some concerns about that. I hear people say those end up being costly; that there is not a competitive nature to them, and that flies in the face of what we ought to be about.

Can you respond to that question of sole-source contracts?

Mr. LADER. I will ask Mr. Jenkins in a moment, but I will return to the same ground I went over with the Chair, and that is, while there is not a bid, there is the element of competition. You have got 6,000 firms competing for various jobs. In most cases there are a variety of firms seeking that particular contract. They have to demonstrate through their own marketing ability why they are the most competent to get that award.

Then when they get it, they have to determine that the price is fair and reasonable, and then they have to perform. So, there are levels of competition, though the Chair is correct, there is not the bid element to it. That is a matter of public policy.

Mr. POSHARD. But is the construct for this procedure with respect to 8(a) any different than what we do in awarding sole-source contracts in other parts of the Government?

Mr. LADER. No. What I pointed out earlier is just either of the two largest sole-source contracts in the Federal Government, just one contract is larger than all the 8(a) contracts put together. In fact, of the next five after the top two, any one of them would be

as big as half of all the 8(a) contracts put together. So, it is not a sole source that is a procedure simply for one particular group.

I should mention relating to your prior question to Mr. Jenkins, we actually have realized a lower contract default rate on the 8(a) contracts than on Government contractors generally, which is a very good index of performance.

Mr. POSHARD. I know my time is running out, but one final question: Who has the responsibility or is there a responsibility within SBA to make sure that the business plans of the 8(a) contractors are current, they are kept up? This is a big deal for us when we are trying to get EDA or any Agency to help a small business or a municipality and so on.

Everybody has got to have the business plan. Everyone has to have that up-to-date in order, all relevant information.

Are we doing that with 8(a) contractors?

Mr. LADER. I will ask Mr. Jenkins to respond. Let me mention an illustration of how we are taking this pending issue very seriously. A number of years ago there was little review of the individual business plans. Three years ago we did an annual review of I believe it was 57 percent of all the participating firms. This year we are at 84 percent, this past year.

I expect this year, because we have set it as a goal for the performance review of every SBA district director, we will have 100 percent review of those business plans. So, we are making significant improvement.

Why don't you explain how that is accomplished.

Mr. JENKINS. Yes. As Administrator Lader mentioned, we have a goal now in every single one of our district directors. The business plan evaluation is the responsibility of our district offices. Our headquarter's responsibility is to monitor the district office's compliance.

As the data is now indicating, we have completed 84 percent of annual reviews last year, and we plan to do 100 percent this year in terms of reviewing firms as it relates to their business plan. If firms are not providing us with the data to conduct that review, we are moving aggressively to remove them from the program and our data supports that.

Mr. LADER. That is part of the reason, Madam Chairman, that in the last 2 years, there have been removed from this program more firms than in the entire prior history of the program back to 1968. We are aggressively monitoring this.

Mr. POSHARD. Thank you, Madam Chairman.

Chair MEYERS. Ms. England-Joseph, would you like to respond to that?

Ms. ENGLAND-JOSEPH. The only comment I would like to make is related to the study that you all conducted in February 1996 in looking at the annual reviews that the field staff had performed. I think when we talk about how many business plans have been reviewed, going from 1 percent to a much higher percentage sounds really good, but I think we have to think about the quality of that review.

To me, that is the more serious issue, how well can we review these plans and provide assistance to these firms so they can improve their business planning. I do credit SBA for doing the study,

because I think it gives them a lot of information now on what they need to do in terms of skills of the staff.

You may have missed this in my opening statement, but they did identify some serious weaknesses in their staffs' abilities. Financial analysis was very poor, and their understanding of the concepts of economic disadvantage, financial conditions of the firm, and access to capital, as well as their comparison of 8(a) firms' condition to non-8(a) firms in similar lines of business, were limited.

Those factors are critical to reviewing a business plan as well as determining whether those businesses are really ready or not to depart from the program and to graduate. So, I would highlight that as an issue that I think remains on the table.

Mr. LADER. She is exactly right on that point. It was a shortcoming of our evaluation. For that reason we began this year financial training of the individuals who are reviewing these business plans. We have just had a class of 60 finish that training. We have a national training program of all the individuals around the country who are involved in business plan review. That is something we plan to continue to be doing. It was a shortcoming.

Mr. POSHARD. Thank you. Thank you, Madam Chairman.

Chair MEYERS. Ms. Kelly.

Mrs. KELLY. Thank you very much. I want to say that I have some concerns about the 8(a) Program. One of the concerns I have has to do with the fact that the geographic spread within which these 8(a) participants, the contracts were awarded, was so very narrow, I think Congressman Flake would agree with me, we could certainly use some of those in New York.

As I understand it, Washington, DC got 25 percent of the contracts. Over half of them, the people who graduated from this program never got a single contract. I am pleading for New York, but I am also pleading for a wider geographic spread.

Chair MEYERS. If the gentlewoman would yield, they have 50 percent of the dollars right within the beltway. It might be 25 percent of the contracts, but it is 50 percent of the dollars.

Mrs. KELLY. I think that it is important that if we are going to have such a program as this, that it be something that is evenly spread across the United States.

I also wanted to know why the administration has been arguing that the 8(a) Program needs to be reformed when you had 4 years to get it reformed. Why hasn't this happened before?

Mr. LADER. If I might respond to each of those points, Mrs. Kelly, on the first point, the dollar amount for Washington area firms is about 35 percent, not 50 percent. It is still a very great concentration. But you have to recognize that this is firms that may be performing work well beyond, it may be right in your district, but if the firm is headquartered around the beltway, that it would be included in that number.

Mrs. KELLY. Do you have figures on that?

Mr. LADER. I don't have the specific number.

Ms. KELLY. I would like to see figures on that.

Mr. LADER. We will provide whatever information we have on that.

Chair MEYERS. I would like to know what year those figures are from also. I think according to the most recent year, a greater per-

centage is within the beltway. That is something we can check later. But this is my understanding.

Mr. LADER. Let us provide you with that. Congresswoman, let me point out to you, the reforms to which we refer are not beginning today and didn't begin last year. We have aggressively throughout these last 3½ years been addressing this.

The illustrations I give, 3 years ago the average length of time to process an application to enter the program was 208 days. Today it is 90 days. We have been talking for 10 years around the Agency, I am told, about the need to have a management information system. It is now finally in place, though it took several years to get that in place.

So, on each of these matters, there is improvement that has been made, but we are suggesting that continued improvement certainly is necessary, and the GAO report highlights the areas where we concur the most attention needs to be addressed.

Mrs. KELLY. Are you also suggesting that perhaps some of these firms ought to go out and reach into the marketplace as a part of the program under competitive bidding? Because when they leave the program, they are going to be in a competitive bidding situation. It seems to me that if you are going to shore up a budding business, that they should be in a marketplace situation before they leave the program where you can help them do that, understand what it is to put a bid together and get it out and stand up. I don't see anything, I haven't heard anything, in the hearings, that indicates that. Is that part of your program?

Mr. LADER. It very much is, to try to prepare businesses for that competitive mix. But there is an error in your basic premise there, if I might respectfully point that out. When you say they will go out and face competition, even in procurement circles, some $63 billion of the $200 billion of Government contracts are sole-sourced.

Mr. LAFALCE. I didn't hear that, Mr. Lader. What did you say?

Mr. LADER. I stated that $63 billion of the $200 billion of Government contracts are sole-sourced.

Mr. LAFALCE. You are kidding me.

Mr. LADER. Would I do that to you, sir? That is why I point out, Congresswoman, that just either one of the two largest contracts that were awarded by the Federal Government, just the individual contracts are more than all the contracts under the 8(a) Program put together.

Similarly, Madam Chairman, I want to point out that those firms going into the commercial marketplace are not going to be in bidding situations. They are going to have to market themselves against other providers of goods and services, and they are currently doing that in the 8(a) Program, because there is no handout or giveaway. Once you get in the program, it doesn't mean you automatically get a contract. You have to compete with other firms to win those awards.

Mrs. KELLY. Thank you.

Chair MEYERS. Ms. Velázquez.

Ms. VELÁZQUEZ. Thank you, Madam Chairman. Ms. England-Joseph, do you know, and I know this is not regarding your study, but just out of curiosity, do you know how many big corporations have graduated from corporate welfare?

Ms. ENGLAND-JOSEPH. No, ma'am.

Ms. VELÁZQUEZ. I thought not. Regarding your finding on over concentration of 8(a) awarded of contracts to a few firms, where are these firms located?

Ms. ENGLAND-JOSEPH. Could you repeat the question again?

Ms. VELÁZQUEZ. Regarding over concentration of 8(a) awarded contracts, where are these firms located?

Ms. ENGLAND-JOSEPH. The concentration issue that we were making was just in the firms themselves, not where they were geographically located. We were not making a point about geographic location. I can get that data for you, but I don't have it right here to be able to give you at the moment.

Ms. VELÁZQUEZ. What about the claim they have been over concentrated here inside the beltway. Do you have any data?

Ms. ENGLAND-JOSEPH. Several years ago in response to the 1988 amendments, we were asked to do a study on a number of issues as a result of those amendments, and we looked at geographic concentration, and there was geographic concentration in and around the Washington, DC metropolitan area. But we have not done any work since then to try to follow up and look at that, partly because most of the discussion and hearings tended to focus much more on the concern with the concentration in large firms.

I think many seemed to understand in previous hearings that more and more firms are moving all over the country, and they may have an office here, but they are actually physically located in other parts of the country. So, geographic location on its own may not be a clear indication of what is happening out there.

Ms. VELÁZQUEZ. Did you interview any successful 8(a) firms?

Ms. ENGLAND-JOSEPH. As a part of the follow-up we did in the last 4 weeks? No, ma'am.

Ms. VELÁZQUEZ. In order to present a more complete and accurate review of the effectiveness of the program, wouldn't it have been valuable for you to talk to those firms?

Ms. ENGLAND-JOSEPH. If we had been asked to evaluate the overall effectiveness of the program, we would have attempted to do that. That was not what we were asked by Congress to do. We were simply asked to follow up on and update information that for the last several years has been requested of us. But you are exactly right, if we were going to do a broad-based review on effectiveness, one of the things we would need to understand is what makes a firm successful and what makes a firm perhaps not so successful. That was not the objective of our work.

Ms. VELÁZQUEZ. Maybe we should request another study that will deal with those issues.

Ms. ENGLAND-JOSEPH. We work for the Congress.

Ms. VELÁZQUEZ. Mr. Lader, concentration of contracts in one area has been a concern with 8(a) and Federal procurement in general. What is SBA doing to provide a more equitable distribution of 8(a) contracts?

Mr. LADER. Two observations: First, as Mr. LaFalce pointed out with his examples of 128 or Silicon Valley and Professor Porter's reference to clustering, it is not atypical for businesses engaged in certain industries to be located close to each other, and it is par-

ticularly a phenomenon-for businesses to be close to the procurement Agencies.

In other words, individuals, even the very small business person, will typically try to locate that business person to be closest to the customer to be responsive. If the customer is a Washington-based Government Agency, it is not all together surprising, then, that many of the firms are located nearby.

That being said, we recognize the continued need, Congresswoman, to make sure this is spread across the whole country. For that reason, through our small business development centers, through our district offices, through our outreach efforts, we are trying to help all small businesses around the country be better prepared to participate in Federal procurement, not just those firms that are engaged in the 8(a) Program.

Ms. VELÁZQUEZ. Mr. Lader, if you don't have this answer, maybe Ms. Joseph will help. Compared to all Federal contracts, what percentage does 8(a) represent?

Ms. ENGLAND-JOSEPH. I think you had it in your opening statement.

Mr. LADER. It represents 3.1 percent.

Ms. VELÁZQUEZ. What would be the impact on small disadvantaged businesses if this bill were to become law?

Mr. LADER. If you were to remove that 3.1 percent, the total minority business participation in Federal procurement would be 2.4 percent. In other words, the largest procuring Agencies, the largest source of procurement in the world, worth some $200 billion, only 2.4 percent would go to minority businesses without this program, if you were to assume that there were no other changes.

Ms. VELÁZQUEZ. Thank you, Madam Chairman.

Chair MEYERS. Mr. Fields.

Mr. FIELDS. Thank you, Madam Chairwoman. Before I get into my questioning, I would like to elaborate just a few minutes on the rule of the House. I requested through a parliamentary inquiry——

Chair MEYERS. I beg your pardon, we have had a response. We contacted the House Parliamentarian. He has been consulted on the request of the Minority to have a day for the Minority to call witnesses in the hearing on this topic. The Parliamentarian says the Chair may take this under consideration and must provide reasonable notice of my decision.

I have stated to you that I have no objection to having a hearing if it is something that we can work out. Therefore, I certainly will abide by the rule of the House Parliamentarian.

Mr. FIELDS. I thank the Chairwoman. But let me make one thing emphatically clear. The Chairwoman does not have the right under the rules to deny the Minority a hearing, and that is why I want to make it very clear. I certainly do not want the Chair to operate under some type of rules that are not the Rules of the House.

Rule XI 2(j)1 states in no uncertain terms whenever any hearing is conducted by any Committee, upon any measure or matter, the Minority party members on the Committee shall, not may, not should, not maybe, but shall be entitled upon request to the Chair by a majority of the Minority Members to call witnesses by the end of that hearing.

So, I just want to make it emphatically clear. That is why I wanted a parliamentary inquiry, because I wanted the gentlewoman to know she does not have the right to deny the Minority the opportunity to bring witnesses before this Committee.

My question is to Mr. Lader. Thank you, sir, for being here today. Procurement outside of the 8(a) Program as relates to minority businesses, did I understand you to say that is about 2.4 percent of individuals who participated, small businesses that participate in Government procurement——

Mr. LADER. Minority-owned.

Mr. FIELDS. Through the 8(a) Program it is 2.4 percent; is that correct?

Mr. LADER. That is correct.

Mr. FIELDS. In the Government Procurement Program, it is about 3 percent?

Mr. LADER. Yes.

Mr. FIELDS. So you have a total of about 5.4 percent?

Mr. LADER. Yes.

Mr. FIELDS. Total minority participation in the Government procurement program, about 5.4 percent.

Mr. LADER. 5.5 percent.

Mr. FIELDS. Less than 6 percent. With this legislation, without any substitute, we could reasonably assume that we lose 3 percent; is that not correct?

Mr. LADER. That is correct.

Mr. FIELDS. So the total Government, you are not suggesting if we pass this piece of legislation, that the total Government procurement to small businesses could be a mere 2.4 percent?

Mr. LADER. It could be. That is the point.

Chair MEYERS. Excuse me, not to small businesses.

Mr. FIELDS. To minorities.

Mr. LADER. The Chair would perhaps argue, if I might take your brief for a moment, that some of the provisions in this bill would help increase that amount of minority participation, to which I would respond virtually all the services that are provided in this bill are services already provided by the SBA in its other programs. So, if we were to have the elimination of the program, we would do everything we could as an Agency through our other programs to help increase minority participation in procurement, but are entirely correct to say that there is nothing to suggest that that 3.-some percent would perhaps disappear.

Mr. FIELDS. I want to finally talk about the competitiveness within the applicants who are 8(a) certified, because there has been a lot of talk about these are nonbid contracts.

Can you explain to us the type of competition that takes place within the 8(a) Program in terms of those individuals who qualify to compete for contracts? Because you stated that though there are about 6,000 or so businesses, only half of them actually benefit from the 8(a) Program because of the competition.

Mr. LADER. That is correct. I will address one part in brief and then ask Mr. Jenkins. The part I want to refer to is what I have mentioned several times already, and that is that the individual firms must get out there and market themselves. They must, just as you do in the commercial marketplace, demonstrate that they

have what it takes to provide the goods and services. Then when convincing the procuring agent, they have to have a determination that the price is fair and reasonable.

There is a prior question of competition. That is to get into the program. Let me ask Mr. Jenkins to address how we determine who gets in the program.

Mr. FIELDS. I am out of time. Let me close by saying does discrimination still exist in Government procurement today?

Mr. LADER. The program manager directly responsible can give you the best insight.

Mr. JENKINS. Can you repeat that part of it?

Mr. FIELDS. Does discrimination exist today in Government procurement or minorities, women, Hispanics, blacks, disadvantaged whites, when they try to obtain Government procurement? Today in general or is there no discrimination in the procurement cycle sector of the Government?

Mr. JENKINS. Well, one of the things we certainly like to point out with the proposed bill is that there is no data or any analysis which would indicate that the elements of discrimination or the basis for setting up the 8(a) Program has been overcome. So, we have no analysis to say that these problems have been resolved.

Mr. FIELDS. So the answer, what I want to know is, is there still a problem? Is there discrimination within the procurement area of the Government?

Mr. JENKINS. I think the disparity between the numbers dictates that, and the answer would be, yes.

Chair MEYERS. Ms. Norton.

Ms. NORTON. Thank you, Madam Chairman. As a preliminary matter, may I note that the rule about at least 1 day of hearings says, "the minority party Members on the Committee shall be entitled, upon request to the Chairman by a majority of Members before completion of the hearing, to call witnesses selected by the minority to testify." I think it was important that the Ranking Member, Mr. LaFalce, raised the point, and that the point be clarified. I don't think there is any way to read this rule except that it gives no discretion and was meant to give no discretion whatsoever to the Chair, whoever she might be.

Chair MEYERS. Ms. Norton, I think that Mr. LaFalce will agree that if we have not agreed on anything else, I have tried to be as open as possible about allowing witnesses from the Minority. I certainly think that I have been at least as open as Mr. LaFalce was.

Ms. NORTON. I hope this is not being taken from my time.

Chair MEYERS. We received no names this morning.

Ms. NORTON. I have a number of questions, and I just want to be sure this is not taken from my time. I simply wanted to, because this matter says it has to be raised before the completion of the hearing, to indicate that taking a matter under advisement about which you have no discretion is not the appropriate response. It seems to me you have to have a hearing, the rule is clear, and you have not said there is going to be a hearing.

I just read it to you. I don't want to make an issue of it because I have questions for these witnesses, if you don't mind.

There has been some discussion here about what would be indications of success, and I can understand the concern there, and I

am looking for objective indications of success, and perhaps I draw from Ms. England-Joseph's testimony and would like her response as well as Mr. Lader's response, because she reports a fairly dramatic figure, that a larger percentage, and I am reading from page 2 of her testimony, a larger percentage of the firms in their final program year achieve the required level of 8(a) business than we reported in April 1985. Eighty-five percent, compared with 37 percent. That is a figure that needs elucidation if we are looking for indications of success.

Also in a response it was indicated in passing that 8(a) firms had a lower default rate than other firms. I would like to ask Ms. England-Joseph how she would evaluate these two standards as an indication of success? Lower default rate and more non-8(a) business than 8(a) business.

Ms. ENGLAND-JOSEPH. With regard to the business mix and the 8(a) versus non-8(a) business activity, I do see that as a measure of success in the program in the sense that in 1988 amendments, it was quite clear, in my opinion, that the Congress was looking for a movement toward firms that were in the program to become much more a part of the real marketplace.

To the extent that they could compete and get access to non-8(a) business was a good indication of that activity and that ability to compete in a non-8(a) environment. So, yes, I see that as an indication of success or an indication of what might be happening in the program.

Two issues, one is that it is right now at 58 percent. It has moved up by 21 percent from the previous fiscal year. But there is still more that needs to be done for those firms. I recognize that that is largely what SBA is attempting to do and really paying attention to these business plans and trying to understand how to provide better guidance and advice to these firms that are moving toward more of a non-8(a) activity.

The difficulty sometimes with that data is not really knowing whether any of that activity in the non-8(a) area is due specifically because of the 8(a) Program. Now, I don't want to——

Ms. NORTON. What do you mean, due specifically to the 8(a)? It is non-8(a) business.

Ms. ENGLAND-JOSEPH. One of the things we have spoken to SBA about is the need for better information about the firms as they are certified. I think the more we know about the conditions and characteristics and the qualities of the firms as they enter the program, it may give SBA a clear indication of whether certain types of characteristics may actually bode well for an individual firm, and that if those characteristics are not apparent at the beginning of the program, then there may need to be other activities that would have to be applied or provided to those firms in order to bring them up and equally as successful as they run through the program.

So, knowledge at the beginning of the program, in my opinion, gives you not only a baseline but an opportunity to make a linkage between where firms were at the beginning and where they are at the end of the program.

Ms. NORTON. The numbers increased. How do you account for the rather dramatic percentage increase in non-8(a) business of firms during the 2 years you compared?

Ms. ENGLAND-JOSEPH. It could very easily be that the firms are quite qualified to compete and able to compete in the non-8(a) environment. So, there is no question that separate from the program, these data would indicate that these firms are getting a much stronger foothold in the normal marketplace.

Ms. NORTON. Another hypothesis might be that in a competitive environment where you belong to a disadvantaged group, the fact that you have gotten an 8(a) contract gives you more credibility to go out and get other 8(a) business and thus helps you to graduate from the program.

Ms. ENGLAND-JOSEPH. Absolutely. I am not suggesting that is not true. It is just that we don't have real good cause and effect data in order to suggest what could happen in the program that benefits the recipients of these activities and what needs to be enhanced perhaps or changed in order to improve the success of firms as they are proceeding through the program.

It simply is a program management issue, in my opinion, that is critical, and the data would be the way in which to understand what changes in the program are warranted.

The other concern that I have, when I was mentioning certification, is that I have some concern that we simply talk about the 6,002 firms that have been certified. We don't know how many of those firms really intend to participate in the 8(a) Program. We do know that firms want that certification because it provides them access to State contracts, to other Federal contracts that are non-8(a).

I think that would be really important for SBA to know, so that the base on which we are trying to determine how many firms are receiving 8(a) contracts ought to be a base largely driven by the firms that want to be in the program versus simply wanting to be certified. So, again, there are several things I think we have talked about with SBA that move toward the direction of better understanding what the success of the program might be, and no one indicator, I think, is sufficient.

Chair MEYERS. The Chair recognizes Mr. Clyburn.

Mr. CLYBURN. Thank you, Madam Chairman.

Madam Chair, if I may, I would like to roll two questions into one for Ms. England-Joseph. They have to do with the graduation versus what I would call successful terminations.

Now, I understand that there have been only three graduations, but a number of terminations. I would like to know whether or not any effort had been made in order to find out whether or not any of those terminations from the program were what I would like to call from the old manpower development and training days, successful terminations, rather than failures.

Then, whether or not there have been any follow-up interviews, I think, with you said 48 percent of the companies no longer in the program or are no longer in existence, or 48 percent of the ones that came into the program and have left are no longer in existence, I think I heard that somewhere.

I would like to know whether any effort has been made on the part of the GAO or SBA or anybody to find out, first of all, whether or not to the extent those terminations were successful, and second,

to find out from the 48 percent why is it that you are no longer in business?

Did you revert back to your status before you came into the 8(a) Program, did you find yourselves being subjected to the same kind of social pressures and realities that you experienced before you received the protection of 8(a)? I would like to know whether or not anything was done to find those two things out.

Ms. ENGLAND-JOSEPH. Yes, sir. The term "graduation," the definition of graduation, the criteria, are all driven by SBA, and we simply reported to you the data as SBA reported it to us. In terms of successful termination versus terminations because the businesses were not complying with program requirements, the data we received was aggregate, and it is not easily or readily available on what basis these firms were terminated. It is an excellent point. It is an issue we have as well, because I think the more that SBA and you all understand on what basis firms depart from the program, the better you would be in a position to assess the program itself.

Now, in terms of follow-up interviews, you must be referring to the annual review that is done by SBA, and it is not done by GAO, so that 48 percent would be something that SBA could speak to. But we do know from our look at those annual reviews and also speaking to and reviewing the IG reports, is that it is very difficult at a minimum to collect that information, and I would be surprised if SBA was able to understand beyond the 48 percent what really has happened in terms of those firms.

It is another issue that I think is really worth pursuing. However, I do know it is extremely difficult to find these firms. We have done other work for the Congress where it is extremely difficult to follow up on small business firms as well as minority and socially disadvantaged firms. Once they are off the radar screen, it is very difficult to find them.

Mr. LADER. Congressman, first, when you refer to successful terminations, I think if you look at the commercial mix percentage rising, that is one very good index of more of the people leaving are successful in terms of being commercially viable.

Second, this management information system, the computer model we have finally put together after a decade of work, is going to be very helpful to ensure we get more data like this and keep track of the data. Though you are very correct, it is oftentimes difficult to track down the firms after they have left the program or gone out of business.

You should know that last year, 550 firms completed 9 years successfully. They did not graduate by our definition, but at the end of 9 years, 550 left and were commercially viable and successful. Two hundred firms were terminated in an unsuccessful sense. So, that is a good balance that we can see.

Mr. CLYBURN. That is the number I am looking for. That is the first time I have heard that number today. I think that is very, very important, 500 versus the 200. Thank you very much.

Chair MEYERS. Mr. Flake.

Mr. FLAKE. Madam Chair, thank you very much. Let me begin by just making sure we clarify one point, and I am going to ask both Ms. Joseph and you, Mr. Lader, if you will agree or disagree

with this statement; that 8(a), as opposed to what has been stated here, in fact, passes constitutional muster. It passed the test. The language of *Adarand v. Peña,* in fact, says that 8(a) serves a compelling Government interest and is narrowly tailored to serve that interest, and therefore is constitutional. Am I correct or am I incorrect?

Mr. LADER. You are correct. Let me ask our general counsel, who has been working with the Justice Department, to respond directly.

Mr. SPOTILA. Congressman, as you know, the Department of Justice and the SBA have been working jointly in several cases that have raised these issues. We have made the argument thus far we think successfully that 8(a) does comply fully with the standards set down by the Supreme Court in the Adarand decision; that it is constitutional, a business development program designed to help disadvantaged firms. We are certainly continuing to work along those lines. We think that the program is narrowly tailored and does meet the compelling Governmental need.

Mr. FLAKE. Ms. England-Joseph?

Ms. ENGLAND-JOSEPH. Our general counsel has not taken or officially spoken to the issue of whether the 8(a) Program meets the constitutional language, but that is also not to suggest that it does not. We just have not been asked to nor have we made a statement regarding that issue.

Mr. FLAKE. Mr. Lader, your statements indicate that the aggregate total of contracts to minorities under the 8(a) Program comes to about 5.5 percent. That means that 94.5 percent of the contracts that are being let by the Federal Government are not going to minorities, nor is the 63 percent of Federal contracts that are sole sourced. Who are they going to?

Mr. LADER. One must remember that when you talk about the largest single procurements, oftentimes they are to shipbuilders, to aviation industry businesses and the like, and so we are talking about very large single purchases. That excuses the numbers. But that gives you a sense of the whole range of goods and services that are represented in that sole source.

I don't mean to point out just those two industries, but those are certainly some of the largest contracts.

Mr. FLAKE. It does indicate if your primary sole source contracts are going into shipbuilding, aviation and areas in which traditionally minorities are not involved, that this 5.5 percent aggregate in fact is left for contracts in other categories, e.g., maintenance and other smaller suppliers; am I correct?

Mr. LADER. I would say it is a very diverse crowd. None of us should sell ourselves short. The 8(a) contracts go for high-tech, software development, light manufacturing, as well as maintenance or other sorts of work. So, it is the full range of goods and services that are represented in the 8(a) universe.

Mr. FLAKE. Is it correct to say that this 94.5 percent of contracts is primarily reflective of white males?

Mr. LADER. Though I have not seen the specific statistics, I think that is a reasonable assumption.

Mr. FLAKE. So one cannot argue that the "old boy" network is operative in 8(a), but in fact if there is an "old boy" network, it is in this 94.5 percent category.

Chair MEYERS. If the gentleman could yield, could I make just a comment here? Noncompetitive contract awards other than those made pursuant to Section 8(a) must meet at least one of the statutory exceptions to the full and open competition standard mandated by the Competition in Contracting Act (CICA), and requires the contracting officer to follow a detailed justification and approval process, gaining permission from a higher level Agency official, depending on the value of the proposed noncompetitive contract award.

Now, at the request of then Chairman of the Committee Mitchell, 8(a) contracts were explicitly exempted from CICA's competition requirements and the requirements of its justification and approval process. 8(a) completely stands alone in this regard.

Mr. FLAKE. I would like to reclaim my time and ask unanimous consent for an extra minute for the time you took. Thank you very much.

Even under the statement of the Chairlady, the reality is that the number of minority contract awards would be reduced if it were not for the fact that there is an 8(a) Program. Am I correct or am I incorrect?

Mr. LADER. You are correct, and I would refer you to the Federal Register of May 23, 1996, in which the Justice Department has said that they have found that minorities continue to face impediments to participation in Government procurement. Your conclusion is totally consistent with the Justice Department findings.

Mr. FLAKE. Could it be also a fact that the high percentage of contract awards to 8(a) firms located within this geographical area has as much to do with the reality that many 8(a) firms do not have the resources to travel to where the primary procurement contracts are being awarded, namely right here in the District of Columbia, as opposed to being let in South Carolina, North Carolina, New York, or somewhere else?

So, that the actual cost of competing for contracts in the 8(a) Program is prohibitive for some of the minority contractors who would otherwise be applying to get some of these contracts. Would that be a correct assumption?

Mr. LADER. It is a reasonable assumption, certainly, sir.

Mr. FLAKE. Reasonable is generally pretty correct. Thank you very much, Madam Chairman.

Chair MEYERS. I would like to call next on Mr. Jackson. I would like to make a comment, however, or let me put this in the form of a question: Would you say that small business faces impediments in competing for Federal contracts? Not just minority small business, but all small businesses face tremendous competition and difficulties in competing for Federal contracts?

Mr. LADER. That is true, Madam Chair, and that is part of what your Committee and our Agency has been so focused on.

Chair MEYERS. And I think you will recall that I fought alongside Ms. Collins twice this year on the floor to bring about more full and open competition in contracting and to end sole-sourcing, not for minorities, but for everybody.

Ms. WATERS. That is not in the bill.

Chair MEYERS. No, it is not.

Ms. WATERS. Put something in here on sole-sourcing.

Chair MEYERS. I am stating that full and open competition is something that I feel very, very strongly about. Not just for minorities, but across the board.

Mr. FLAKE. Would the gentlewoman yield?

Chair MEYERS. Yes.

Mr. FLAKE. I think we have to be very clear that all small businesses do, in fact, face impediments. The particular focus of this program, however, that says that one impediment that is not faced by the average nonminority small business is that, when a black face walks in to confront a procurer he or she has to deal with the reality that there is almost an automatic rejection mode that is put into play, even before there is a discussion of what that particular minority business is seeking.

I sit here as a business person. I can tell you about going to 30 or even 40 banks, and those banks rejecting before they even understand what the application is about or for, based simply on the fact that the person happens to be African-American. It doesn't matter whether you have an MBA, Doctorate or anything else. That is the question that we have to deal with, and we don't want to deal with, because the bottom line is that there is yet a major discrimination in America.

Chairman MEYERS. Mr. Jackson.

Mr. LAFALCE. Would Mr. Jackson yield for 30 seconds? I want to point out when you make reference to another bill in which you aligned yourself with Mrs. Collins, and which virtually every member of this Committee was on the same side, that is apples. This is oranges. You cannot rationally make a comparison between those two.

Mr. FLAKE. It is lemons.

Mr. LAFALCE. I agree with Mr. Flake, it is lemons, not oranges.

Mr. JACKSON. Reclaiming my time, Madam Chairman, I am glad that you took the time in your opening statement to express your concern for the plight of women entrepreneurs. I hope this means you will not reintroduce language that you authored which would have meant the early termination of the Women's Demonstration Grant Program.

Perhaps now you will join me and our Ranking Member, Mr. LaFalce, in permanently extending the authorization of this program which has spread nonprofit women business centers across the Nation.

Let me just begin by saying briefly that I am an ardent believer in this program, the 8(a) Program. It has enabled minority entrepreneurs to withstand the discrimination and, quite frankly, as Mr. Flake has indicated, the racism that they often face in Government contracting. The reality is racism and discrimination persists in the free enterprise system and qualified businesses, and I am talking about qualified businesses, cannot get a contract.

I want to center some questions around that concern. Anyone is capable of answering them. The reality is that many of these businesses were in business before they applied for the 8(a) Program. Is that correct?

Mr. LADER. Yes, sir.

Mr. JACKSON. Once they get in the 8(a) Program, they are really provided an incubation from the racism and discrimination that presently exists in Federal contracting; is that correct?

Mr. LADER. That is correct.

Mr. JACKSON. I believe it was the lady from the GAO who indicated after they leave the 8(a) Program, 50 percent or thereabouts of these businesses do not survive; is that correct?

Ms. ENGLAND-JOSEPH. No, I did not say that. I believe someone else referred to the SBA study. That is not a GAO study. We are familiar with it, but you may want to have SBA describe how that study was done.

Mr. JACKSON. Is that because many of those businesses, once they are out of the 8(a) Program, continue to face the discrimination that the 8(a) Program provided them with in terms of incubation?

Mr. LADER. Mr. Jenkins?

Mr. JENKINS. We do not have empirical data to support that, but we have heard certainly anecdotal information from these firms that, in fact, this is part of the reason why either they have gone out of business or continue to struggle.

Mr. JACKSON. Let me address these questions to the GAO and let's see if we can arrive at some of that empirical data. Is it a fact that over 90 percent of Federal contracting dollars go to companies owned by white men, even though the SBA 8(a) Program has doubled the contracting awards for socially and economically disadvantaged entrepreneurs?

Ms. ENGLAND-JOSEPH. It is true that the statistics that were quoted by the administrator, 5.5 percent of the activity is directed at or the beneficiaries are minority-owned businesses. Yes, if you were to take that from 100 percent, the 94.5 which Congressman Flake referred to, would mean all other groups that are not in the category of minority-owned or socially and economically disadvantaged.

Mr. JACKSON. These statistics are coming from the Department of Justice. Isn't it a fact when comparing entrepreneurs with identical borrowing characteristics, the average white borrower in the construction business receives over 50 times the loan equity cap as the average African-American small business owner?

Ms. ENGLAND-JOSEPH. Are you asking me to confirm the Justice Department statistics?

Mr. JACKSON. I certainly am, if you can.

Ms. ENGLAND-JOSEPH. I can't confirm them, but those are probably the best available data right now. I can't point to anything else that would contradict that.

Mr. JACKSON. Your acknowledgment that that is the best data is certainly a step in the direction that I am heading.

Among applicants with the exact same credentials, wealth, work and borrowing credentials, minority applicants for venture capital are 20 percent more likely to be rejected than a white applicant.

Let me just read one other fact from the Justice Department. When firms of equal experience level are compared, nonminority firms are nearly twice as likely as minority firms to obtain bonding for their services, three times as likely to obtain bonding for over

$1 million, and, on average, are charged lower rates for the same bonding coverage prices.

Madam Chair, I want to close by making one brief remark. The 8(a) Program is not a handout. It is really a helping hand for those businesses that continue to face discrimination and racism in Federal contracting. The best use of our Committee's time today would be to look at those businesses who continue to face that discrimination so that we can improve this program and make it possible for everyone to have an equal opportunity to participate in the free enterprise system.

Thank you, Madam Chairman, for this time.

Chair MEYERS. Mr. Becerra.

Mr. BECERRA. Ms. Joseph, let me ask you a couple of questions. I noticed in your testimony you mentioned some things that seem troubling when you look at them in a first light. About 18 to 19 percent, I believe you said, of SBA contract dollars went out through competitive bidding within the 8(a) Program; is that correct?

Ms. ENGLAND-JOSEPH. About 19 percent, right.

Mr. BECERRA. About 19 percent. Do you happen to know what percentage of the Federal contract dollars in total go out through a competitive bidding process?

Ms. ENGLAND-JOSEPH. I believe the Administrator made the comment in his opening remarks. I cannot remember off the top of my head what the number was. Do you remember the statistic you quoted?

Mr. JENKINS. Approximately $63 billion that is sole source. There is another $30 billion awarded to other organizations not classified as a business entity.

Mr. BECERRA. So we are looking at something in the order of $90 to $100 billion of about $200 billion total in Federal contract dollars that are awarded without competitive bidding?

Mr. JENKINS. That is correct.

Mr. BECERRA. These are competitive.

These are actually Federal contract dollars going out to firms that could be the size of an Exxon.

Mr. JENKINS. Yes.

Mr. BECERRA. There is no requirement for competition for an Exxon or for an IBM or any of the particular companies that are seeking those sole-source contracts totaling somewhere between $90 to $100 billion?

Ms. ENGLAND-JOSEPH. Under Federal procurement requirements, there is a threshold in which competition must occur, and that threshold is lower than the threshold in the 8(a) Program. The 8(a) Program requires that for manufacturing contracts, the threshold is $5 million and for all other contracts, it is $3 million. So, the threshold for sole-source noncompetitive is different in the 8(a) Program and higher than it is for the rest of the Federal procurement activity. But that is not to suggest that that would in and of itself explain why there is so much sole source going on. There are other issues associated with the sole source question.

Mr. BECERRA. We do have a problem if you want to consider sole-sourcing a problem. We have an overall problem in the contracting

system when you have close to $100 billion worth of contracts that go out sole source.

Chair MEYERS. Mr. Becerra, if you would yield, that was the very point I was making a little while ago, is that I vigorously oppose all sole-sourcing. Maybe there are some extreme cases, but I vigorously oppose all.

Mr. BECERRA. I understand that, Madam Chairman. I think the concern that a number of us have with H.R. 3994 is that if sole source contracts is a concern the Chairwoman has, then the bill should address the entire concern, not just go after one particular program, the 8(a) Program.

Let me move on——

Chair MEYERS. Let me say I have gone after all of them.

Mr. BECERRA. If I may move on, I have a question for anyone from the SBA, Administrator Lader or anyone else. I wanted to make sure we are clear on 8(a) eligibility, and I will ask some really quick questions.

First, are Caucasian women eligible to participate in the 8(a) Program?

Mr. JENKINS. Individually, a Caucasian woman has to demonstrate on an individual basis——

Mr. BECERRA. If you meet the criteria?

Mr. JENKINS. One would be eligible.

Mr. BECERRA. If they meet the criteria, which anyone would have to meet, do Caucasian men qualify to participate in the 8(a) Program?

Mr. JENKINS. That is correct.

Chair MEYERS. Mr. Becerra, they do have to go to court to prove they are socially disadvantaged and only 16 Caucasian women have been allowed in the program.

Mr. LAFALCE. I wonder if it would not be appropriate at this time to call on Mr. Spotila. No one is arguing that the bill is perfect. We are concerned about what your bill would bring about in its repeal. We have some proposals for exchange that have been promulgated in the Federal Register. The comment period has received about 1,000 responses, and Mr. Spotila, perhaps you could elucidate some of the changes that would address these issues in particular.

Mr. BECERRA. So long as he is not doing that on my time.

Mr. SPOTILA. I would be happy to. I will try to be as brief as I can.

First of all, let me respond to your question. Individuals, even Caucasian men and women, are eligible for the program if they establish they meet the social and economic disadvantage test. One point in the Department of Justice proposal which went out for comment, and as Mr. LaFalce indicated, has already generated more than 1,000 comments.

One proposal they have made, which we think would expand an opportunity for more individuals to participate in this program, is the proposal that the evidentiary standard that one must meet in order to establish social disadvantage be reduced from the prior standard of clear and convincing evidence, which to lawyers is a high standard, to one of a more likely than not standard. We think that that will make it easier for individuals, including Caucasian

women, to establish that they also suffer disadvantage, social disadvantage because of their membership in the group of namely the category of white women, and to some degree that is perhaps speculative, but we think is a logical assumption.

It is certainly our effort to try to be more responsive to the needs of disadvantaged Americans around the country.

Mr. BECERRA. I thank you for that response. Madam Chairman, if you would indulge me for a couple of minutes to reclaim some of my time. The only reason I asked these questions is to make it clear that we would want anyone eligible, whether you are a minority or a woman or a minority woman, to be able to participate in the 8(a) Program. Just as we would want anyone who is socially and economically disadvantaged, whether female or male, to participate in the program.

It is unfortunate there have been instances where some people have had to sue to try to obtain their rights under the program. However, I would say there has been a history over the decades of people who have had to sue to try to get their rights under Federal programs whom happened for the most part to be minorities. It is an unfortunate fact that in this country people have to assert their rights, whether they are white, black, brown, Asian, or whatever else. I think everyone is hopeful that what we see out of the SBA is a productive 8(a) Program.

Chairman MEYERS. May I recognize Mr. Bentsen after your response.

Mr. SPOTILA. If I can add briefly, I think it is significant, certainly President Clinton asked us at the SBA to do all that we could to make certain that we made this program one that offered an opportunity for all those who were disadvantaged. I think there has been, I have been at the SBA for 3 years, and I think there has been a serious effort to try to meet that request on the part of the President. We are continuing to try to do that.

Mr. BECERRA. Some of my time was consumed with things collateral to my questions.

Chair MEYERS. However, your light has been red for some time. We have several other questioners. Maybe we will get back to you.

Mr. BECERRA. If I could ask one brief question of Ms. England-Joseph. I ask unanimous consent for an additional minute. I don't think it will take a minute.

Chair MEYERS. Ask your question, be brief, and the answer will be brief.

Mr. BECERRA. The question, Ms. England-Joseph, is: You pointed out that there are some problems that GAO believes should be addressed in the 8(a) program, and SBA has said it would like to try to address them. Have things gotten better from where they were, say, 1, 5, or 10 years ago? Can you make any qualifications as to whether the 8(a) Program has improved or not under SBA?

Ms. ENGLAND-JOSEPH. I think if you look back to when we first started maintaining some statistics on this, which was back in 1991 for the 1992 reporting period, and we have seen some movement, in some cases it has not been dramatic in the areas we were monitoring, but in fact it certainly has not gone down dramatically. It has either stayed stable or moved up.

The places I think where I have been most concerned in the past would have been in the business mix area. As we all said this morning, it appears as though that is moving up. I think that is indicative of the efforts going on, both within the SBA and the recognition perhaps because of all the attention the program has been given where firms recognize they need to be more active and self-marketing to be competitive.

So, I would definitely say over the last 5 years we have seen some change. The other place I would make a comment is in the last year, I think several things that I noted in my statement happened. The decision by SBA to change its regulations regarding ID–IQ contracts to require that the total estimated amount of the contract be used as the basis for determining whether or not a contract should be competed was a very, very good decision.

I think it is something that many of the Members on both sides were concerned about for several years. So, we don't see the result of that yet, so I think we will have to wait until 1996 or 1997 data to know what impact that should have.

Mr. LAFALCE. That should have a dramatic impact.

Ms. ENGLAND-JOSEPH. It should on the face of it. There are a lot of things outside of SBA's control and the procurement system really does have some incentives that are quite different than what you all may have intended in designing the 8(a) Program. So, it remains to be seen what other actions an Agency might do to kind of get around that whole issue of competition.

Chair MEYERS. Mr. Bentsen.

Mr. BENTSEN. Thank you, Madam Chairman. Let me unrelated to this thank Mr. Lader for help with some of the prequalification contracts, minority and women's pre-qual, we have gotten for the Houston area. I appreciate your help and your office's help for that.

Let me say while there is no question the 8(a) Program is not perfect, there are few Government programs that are. I think there are some problems and I have some questions about it. But I would say, Madam Chairman, this is the most crowded Committee hearing I have been to in this Committee in my short time on it, and I would caution all Members to tread lightly as we move through this field, because I am concerned that we have some who are more interested in a political goal than a philosophical or policy goal.

I would hate to see the country divided, whether it is over set-aside programs or affirmative action, for some political gain that would take us another 30 years to correct. Those of us from the South have been through that before, and we don't want to go back there. So, I would hope that we would be very careful in doing that.

Having said that, I also would add we have a lot of Members of this Committee who like to talk about coming from the real world before they were here. I also came from the real world, as I think most Members did.

Nonetheless, I was in the investment banking field before I came here, and the investment banking field is not a very integrated field. There is no question about that. There were, I have to say, there were definite successes in using set-aside programs. There were some that were not. But we saw in our experience where firms that did not have relationships with institutional purchasers of securities, once they were made parts of selling groups, once

they were made parts of underwriting groups, did gain that contact and were able to then market on their own.

So, these things can work. Not always, but that is true with just about everything in life.

Having said that, let me ask both the GAO and the SBA, I do have concerns about disbursement of contracts, and that has been a problem in my area as well, and I have looked at the data. Increasing the competition, that must help disbursement, if you move toward more competition. Is SBA moving in that direction?

Mr. JENKINS. Well, certainly when we closed the ID–IQ loophole, we hope that contracting officers will now realize a lot more competition in the program itself. One of the things that SBA has also done in terms of disbursements of contracts, we have changed our regulations to allow firms located in any part of the country to now bid outside of their district offices, whereas in the past firms were limited to only those buying Agencies within their particular district.

Now, we have not had a full year to see the impact of that, but we certainly would hope that that showed that firms now have better opportunities.

Ms. ENGLAND-JOSEPH. I guess I take a different approach. If you are talking about concentration of SBA contracting dollars in a few firms, one of the areas that I know SBA has been looking at and has considered but has not implemented, are options or actions that SBA can take when firms participating in the program are not trying to get non8(a) activity, or when huge concentrations, in terms of dollars, occur in a few firms and those firms obviously seemed pretty skilled and effective in competing in the non8(a) environment.

Mr. BENTSEN. I am about to lose my time, so I don't want to cut you off, but your review of SBA's data, it is one or the other, would indicate though that there has been — and this is another question — there has been a marked increase in non8(a) contract activity of 8(a) firms; is that correct?

Ms. ENGLAND-JOSEPH. Right. There has been an increase.

Mr. BENTSEN. In some cases a 100 percent increase in the 8th and 9th year? Not 100 percent, but it goes from 37 percent to 58 percent, which is a substantial increase.

Ms. ENGLAND-JOSEPH. For firms in the ninth or last year of program. My point is SBA is trying to decide how to deal with some of the problems I think they see within the program and come up with a couple of options. One was if they saw a firm that was receiving a number of 8(a) contracts and could in fact effectively compete in the non-8(a) environment, they have considered eliminating all those new 8(a) contracts to those firms when they are not meeting their business mix or have considered in fact placing a dollar limit on the value of the total 8(a) activity again to these firms that are not meeting that mix, which is another incentive perhaps in order to encourage those firms that are not meeting the mix to move in that direction.

It ends up allowing more dollars to be available perhaps in the 8(a) Program to firms that do not get access and that might both address the distribution from a geographic perspective as well as concentration.

Mr. BENTSEN. With the Chair's indulgence, and this may be a question to the Chair as well as the Administrator, but H.R. 3994, the bill that the Chair has introduced, if I understand this bill, it would do away with the set-aside program, if that is what we want to call it, and in lieu of that, it would emphasize both the loan and equity portions of the current SBA program for firms which qualified.

First, is that within the existing guaranteed loan authority and equity financing authority, or is that outside? If it is outside, what is the — is there a cost savings associated with that compared to what might be estimated the cost associated with the 8(a) contracting? Are we talking apples and oranges here? Are we going to add more subsidy costs to the taxpayer by going down this route?

Chair MEYERS. We are very short on time. A quick answer, and we will break to go vote. I think we are down to about 6 minutes.

Mr. LADER. As we read the bill, Mr. Bentsen, everything provided as a substitute for the elimination of the 8(a) Program is already being provided in SBA's existing programs. I remind you that last year we did $11.5 billion of financing for small businesses apart from the 8(a) Program, and the 8(a) Program consumes only 3 percent of our staff and 5 percent of our budget. So, in the context of everything happening for small business, what this bill is providing is already being done.

Mr. BENTSEN. This would not be additional lending or equity authority.

Chair MEYERS. We are going to have to go vote. The vote is on the Aviation Disaster Family Assistance Act. We have only two more questioners for this panel. I would ask the Committee to return as quickly as they can and we will move on.

[Recess.]

Chair MEYERS. The Committee will resume. Let me announce when we take the next witness page, we will combine and hear first from Dr. George La Noue and Jeffrey Rosen, and they will be at the table with Ms. Shirley Stewart, Brenda Ford, and Jim Offord. That will be the next panel.

I will recognize Ms. Clayton.

Ms. CLAYTON. Thank you, Madam Chairman. I hope my entrance was not counted against my time. I want to thank the panel that has been here for some time and to say that obviously the legislation that in my judgment we are about to consider is misguided and unnecessary. I would differ profoundly with the Chairlady, who thinks that the way to correct this is to end it.

H.R. 3994 would indeed end 8(a) Programs as we know them, or perhaps in the future.

I am not one who thinks that 8(a) has been a perfect program, but I think it has been a tool that has been effective. Anyone who is serious about providing opportunity for those who are considered to be disadvantaged cannot perceive that tools do not need to be perfected so they can withstand assaults and criticisms as this bill is doing, or potential constitutional challenges in the courts. I think the issue of the constitutionality, I think, has been properly addressed, but let me just reaffirm one reason why this program is unique.

It is considered to be a developmental program. Is that correct?

Mr. LADER. That is correct.

Ms. CLAYTON. Obviously, when we consider something to be developmental in its nature, we have a different mix of business individuals. That is why the classification. So, you should not necessarily have the same standards, though I think, indeed, good business procurement standards are essential in any business arrangement, whether it is for disadvantaged, minorities, women or whatever.

In the final analysis, to be a good, competent business person, those attitudes must be there. There are certain assumptions on here and there is a presumptive assumption. I think one was that one has the assumptive right to sue and find out if indeed a white male or white female is there. But I want to just share with you as someone who is experienced, I too, all people come from the real word, but I too have come from a business background, and at one time I was an applicant for an 8(a). I am living proof that the presumptive assumption worked to deny me that opportunity.

Of course, I read the criteria. I am not sure how they came to that conclusion, but nevertheless I know it is not automatic in simply because you are a minority or a woman. It certainly didn't happen in my case. I don't think I am unique in that particular experience of having to utilize 8(a).

My understanding is there are some 6,000 8(a) certified persons now?

Mr. LADER. Firms.

Ms. CLAYTON. Only half, only half of them have contracts. Can you tell us what the total dollars of the 8(a) contracts are now?

Mr. JENKINS. In this fiscal year it is roughly $3.3 billion as of August 30.

Ms. CLAYTON. Could you tell me what the, and this probably is for Mr. Lader, what is the total dollar amount of non-8(a) contracts for minority firms, do you know?

Mr. LADER. The percentage, the total percentage is 5.5 percent.

Ms. CLAYTON. Which includes 8(a).

Mr. LADER. Which is 3.1 percent.

Ms. CLAYTON. If I did the math?

Mr. LADER. It is 2.4 percent of those which are minority, of the total amount, that are not 8(a).

Ms. CLAYTON. I got the percentages. I had started to interject when my colleague, Mr. Flake, was giving 5.1 to 8(a). 5.1 is the total amount that minorities participate in; is that correct?

Mr. LADER. Yes. The dollar amount would be $11.2 billion of total minority, and of the 8(a) would be $6.4 billion, which leaves $4.8 billion as the balance.

Ms. CLAYTON. So, the total amount of dollars coming to minorities is $11.2 billion?

Mr. LADER. That is right.

Ms. CLAYTON. For 8(a) currently it is $6.4 billion?

Mr. LADER. That is right.

Ms. CLAYTON. The balance would be the non-8(a).

Mr. LADER. $4.8 billion.

Ms. CLAYTON. If this bill were to pass as written, we would eliminate that $6.4 billion for minorities, meaning all minorities, those who qualify under eligibility. Again, the presumption is that a

white female is also eligible and a white male could have that presumptive authority, too. So, that would be eliminated for those disadvantaged communities; is that correct?

Mr. LADER. That is correct.

Ms. CLAYTON. That would only leave $4.2 billion. I think the point should be made where a great effort to clarify and erase the abuse and make corrections, we are really talking about not minuscule, but a small percentage of the total procurement. Not that any one dollar should be misspent, and there has been abuse until 8(a), we should acknowledge that.

Also we should acknowledge there has been some correction. Although I think Ms. England-Joseph, she acknowledged there has been some progress, although not to her satisfaction, but it is moving in the right direction. So, some of those things that have been acknowledged — I don't think you gave me my full 5 minutes unless that clock is off.

Could I ask unanimous consent to have the clock——

Chair MEYERS. You had the full 5 minutes. I don't want to rush you.

Ms. CLAYTON. You don't want to rush me, but you don't want me to talk. How does that work, Madam Chairman?

I acknowledge your desire to move it on. This panel has been here for a long time. Let me make this point: We ought to find ways to address the abuses and the errors and make sure we have a strong program for minorities and others, not necessarily to eliminate the opportunity for minorities and not to eliminate $6.4 billion. That is not the way to make equal opportunity and fair play for entrepreneurs who want to make a contribution.

Chair MEYERS. Ms. Waters.

Ms. WATERS. Thank you very much, Madam Chairman. I am a little bit annoyed I have to be here on a special assignment to this Committee to protect this very, very, very minuscule amount of participation of minorities in this program. I am really annoyed, and I must say this, because at the same time that we are here trying to protect 3.1 percent, Jack Kemp is out on the campaign trail talking about economic empowerment and green power and going into minority communities up in Harlem and South Central Los Angeles talking about it is not about affirmative action, it is about economic empowerment and how he supports the idea that minorities should be earning money and having opportunities to Government procurement.

I also resent the hypocrisy of the Republican convention that spotlighted these little 54 African-Americans who were there talking about the big tent that has been created to attract minorities, because the Republican Party is better for opportunities.

That is flying in the face of this kind of Republican-led legislation. I really am annoyed with it. But I am here, and you can't take my time. Don't take my time. I am here because I have to be here to try to protect this little bit of participation that we have.

Let me note that SBA has been around since 1953, and 8(a) has only been around since, what, 1968, and so I would like to know, prior to 8(a), in the first 18 years of this program, prior to 8(a) let's say, prior to 8(a), what percentage of percentage was thereby minorities?

Mr. JENKINS. I don't think we have that data available.

Ms. WATERS. Could you speculate about it? Why did you have to have 8(a)?

Mr. JENKINS. I think it was clear in the Congress' mind there was a need to increase minority participation.

Ms. WATERS. So even with SBA that was organized to create opportunities for small businesses, still that did not get to minority businesses, and you had to do something even more by the creation of something like 8(a) to get at the discrimination that still took place in Government. Can we reasonably conclude that?

Mr. LADER. Ms. Waters, that was the finding of the Nixon administration when this program was created, and then in the Reagan administration when it was examined further, it was found the reasons for creating the program were still in existence. For that reason, the legislation in the Reagan administration reaffirmed the 8(a) Program.

Ms. WATERS. Am I to understand that whites are basically 100 percent of the sole-sourcing, and I am going to ask for an investigation on that.

Chair MEYERS. I really must ask you to yield and I will yield you an extra 30 seconds.

Ms. WATERS. I yield to the Chairwoman.

Chair MEYERS. The top 100 Federal contractors are publicly held corporations except for some employee-owned firms and universities. These corporations are publicly held by their stock owners who are not necessarily white males. They are women, minorities, white males, labor unions, retirement funds, and so forth.

Ms. WATERS. All right. I am going to ask for a review and investigation of the 63 percent sole-sourcing to find out and to document who is getting the dollars. Let me just say this, because I know something about sole-sourcing. It is not simply in the areas that have been described here today. There are a lot of sole-sourcing that is going on that extends the opportunity. You get in, you get the contract, you build into it an opportunity for that person who is holding that contract to continue to get it, even after that contracting period closes down, because you build it in the beginning of the contracting opportunity. So, we are going to look at this. We are going to investigate this to find out who is holding it. But let me just ask this: Do whites have an opportunity to participate in other SBA programs outside of 8(a)?

Mr. LADER. Certainly.

Ms. WATERS. Certainly. Do they have an opportunity to participate in other procurement opportunities that are not overseen by SBA, and certainly are not in 8(a)?

Mr. LADER. Certainly.

Ms. WATERS. So, again, and I think this is the point to be made, that we are talking about almost 95 percent of all procurement opportunities in Government, including SBA and others, including 8(a), are opportunities that whites basically have and maintain control and get the contracts in those arenas. Is that correct?

Mr. LADER. Well, I think as the Chair points out, much of that would be under the definition of publicly held companies or other entities, where it would be hard to allocate.

Ms. WATERS. You don't know that. We are kind of speculating now, and I appreciate what you are saying, but I want to tell you for all of the companies who have sole-sourcing, whether it is in the public arena or not, I bet you, without even looking at it, that the boards of directors are all white, and mostly white male at that. But we are going to find out, because I know the Chairlady is going to help me look at this because of her concern about sole-sourcing.

Finally, let me ask you, let me say this. I just looked at the application. The reason I asked somebody to bring me this application is I received numerous calls long before I got here, when I was in the State legislature, for assistance with getting through this application process, just to get to be an 8(a) contractor. I know you have streamlined this process since the first time I started getting involved with it almost 10 years ago.

However, those people who get into this program are no fly by-night business people. These are substantial business persons, even though they have not been able to get the capital, they have been red-lined. They have not had access to business opportunities. When you fill this out, you certainly are someone who has started a business for the most part. 8(a)'s are not startup businesses. They don't startup and say I am going to fill out an 8(a) so I can get some business.

They have been out there batting their heads against a brick wall, trying to get capital, trying to do everything. It takes a lot to get through this process.

Would you agree that 8(a) contractors are substantial business persons, may have low capital, may not have access to capital, may not have the reserves, but they are certainly credible business people to get in this program?

Mr. LADER. They are certainly credible business people or they would not be admitted, and they demonstrate a potential for considerable growth.

Chair MEYERS. At this point, I would thank the panel very much for being here and would ask our subsequent three panels to come to the table. That means we will put five in front of us here and one at the end. You have two witnesses. We will put one at the end — maybe we can squeeze the five in.

We will start with Ms. Shirley Stewart. I would ask the witness to get as close to the microphone as you can. They are voice-activated, and thank you.

TESTIMONY OF SHIRLEY A. STEWART-VEAL SHIRLEY A. STEWART, PRESIDENT AND FOUNDER, SAS, GENERAL CONSTRUCTION CONTRACTOR, HERNDON, VA

Ms. STEWART-VEAL. First and foremost, I would like to thank you for inviting me to testify at this hearing. I would like to share with you my experience since being approved in the 8(a) contracting program in October 1992.

I am a small business who seemed to be relegated to small contracts that have barely afforded me a living, let alone in helping to build my business. I had hoped that the 8(a) Program and set-asides would permit me to do larger contracts that would allow me to make sufficient profit and capitalize my company. I would like the Small Business Administration to help me acquire at least one

contract so we can demonstrate our skills and capabilities to assure the Government Agencies that we are a serious and dependable company.

During my first year, the Small Business Administration calculated that I could safely complete 8(a) contracts up to $100,000. The second year, they calculated $200,000. However, despite their increasing confidence in my ability to handle larger contracts, they did not help me to secure a single contract. As a result, I spent a great deal of my time satisfying their administrative requirements for no return.

Prior to being approved in the 8(a) Program, I had been competitively bidding and was awarded a Federal contract with the General Service Administration for $20,000 since being in the 8(a) Program. I have been awarded several contracts, non8(a), ranging from $2,500 to $10,000.

With the Small Business Administration having approved me at the $100,000 support level, I had hoped that they would have helped me to get these types of contracts with Agencies like General Service Administration. However, since my approval with the Small Business Administration, I have been self-marketing and requesting search letters be sent out to various Federal Agencies for larger contracts.

The Small Business Administration, again, has done nothing to help me.

So, I am still excluded, even with General Service Administration. The 8(a) contracting program would be good if it was implemented. My views on the proposed legislation and the effects of H.R. 3994 are that I still — excuse me, is that it still does not help me, because I have utilized all of the counseling programs that have been made available to me for the development of becoming a successful entrepreneur. However, it seems to me the real issues here are not whether the program will work for me, but why the program officers at the Small Business Administration and also the contracting officers seem determined not to help me.

Thank you very much.

Chair MEYERS. Thank you very much.

[Ms. Stewart Veal's statement may be found in the appendix.]

Chair MEYERS. Our next witness is Ms. Brenda Ford. She is President of Ford and Associates, Silver Spring, Maryland.

TESTIMONY OF BRENDA FORD, PRESIDENT, FORD & ASSOCIATES, SILVER SPRING, MARYLAND

Ms. FORD. Thank you, Madam Chairman. My name is Brenda Ford. I am President and owner of a small firm known as Ford and Associates. My firm specializes in interior landscaping. I have been in business for 15 years. I would like to say that I used to believe in the myth that 8(a) and SBA was there to help all small business owners with contract financing, obtaining contracts in their specialized area, as well as any other problems as far as setting up a workable business plan. I was wrong.

Ninety-eight percent of the services that I have just stated has not happened for my company, in the 15 years I have been in business. I am here today to testify about just how unfair, mismanaged,

unethical and corrupt the SBA is toward African-American business owners.

The type of stories that are usually swept under the rug and ignored by directors and appointed Secretaries of the Agencies. I will tell you, first of all, how my firm was denied fair and equal contract opportunities or the opportunity to become 8(a) certified 15 years ago.

As strange as it may seem, by the same SBA representative who most recently denied my firm a contract on a Government project, regardless of the fact that my firm had a proven track record and work performance and was $200 less than the other firm. I will tell you a story of unfair treatment by the Small Business Administration and how they ignore violations of Federal laws and regulations.

Public Law 95–507 is never enforced in this particular case. The cozy relationship between the SBA representatives, the contracting officers, and the facilities services managers, most managers that I have come in contact with in my 15 years give me the impression they are above the law. After all, management has nothing to fear in wrongdoing.

I have documented case after case of wrongdoing by SBA, facilities services managers, and contracting officers. After 15 years, the outcome was always the same: The contract was awarded to the larger firm. Even after such matters were brought to the attention of the Department directors or appointed Secretaries, the managers were ignored by whoever the correspondence was forwarded to and nothing was ever resolved.

In many cases, even Freedom of Information requests, which would give written documentation of biased treatment of African-American firms, has been prolonged or denied.

I do not see the Small Business Administration as being a friend of the African-American community, of businessmen and women. The few who have received assistance or contracts from SBA are few and far between.

I cannot see an Agency being in existence if they are not productive or if they are not doing their jobs to truly help socially disadvantaged and African-American-owned firms. If this were a private industry, would this be allowed?

SBA management has received case after case which involves mismanagement which I brought to their attention, and as I stated before, nothing was enforced. I have even been forced to request letters for the right to sue for financial harm done to my firm. Even my elected official was given the runaround by these Federal Agencies.

I wish to recommend that the Committee seriously consider setting up a task force of private business owners county-by-county and give this task force the ability to bring concerns of the socially disadvantaged business owners to the Committee with recommendations of how Federal funds should be spent with these Federal Agencies, as well as investigate problems brought to their attention by small business owners and expedite requests for information regarding the Freedom of Information Act where there are signs that the small business is facing serious hardship due to actions taken against the Agency by a small business owner.

I give a recommendation that management involved in biased treatment be placed on leave without pay until the matter is resolved. I give a recommendation of suspension of Federal funds for nonprofit groups and private firms who receive Federal money if it is discovered that unethical, deliberate misconduct, denial of fair and equal contracting opportunities has occurred, and management has refused to correct the situation or resolve the problem in a timely manner.

If the African-American community is to survive and provide employment for those within our community, we need to work with individuals of character and who are committed to the well-being of all small business minority owners in the metropolitan area. That character and commitment does not exist with the SBA, and has not for a long time. Instead, we have been given directors who like to talk the talk, but have little intention of walking the walk. Their track record speaks for itself.

Smoke and mirrors just will not do the trick this time. As I overheard one Federal manager say to another, promise them anything, but give them nothing. That is what SBA has been doing for a long time.

I keep hearing the term "racism and discrimination." Well, isn't that against the law? I wonder why these managers who are doing all of this discriminating and are such racist are not dismissed from the Federal Government? After all, wouldn't it resolve part of the problem of fair and equal contracting opportunities?

Ladies and gentlemen, I thank you for allowing me to speak before you today regarding some of the problems faced by African-American business owners. That concludes my testimony.

Chair MEYERS. Thank you, Ms. Ford.

[Ms. Ford's statement may be found in the appendix.]

Chair MEYERS. Mr. Jim Offord.

TESTIMONY OF JIM OFFORD, RETIRED CONTRACT SPECIALIST, SILVER SPRING, MARYLAND

Mr. OFFORD. First, I want to thank you for allowing me to come to support the testimony of the two ladies who are on both sides of me. I consider that a privilege.

My name is Jim Offord. I am retired from the Federal Government. When I was employed by the Government, my position was a Contract Specialist assigned the special task of 8(a) representative of then HEW, Office of Human Development Services. In this capacity, it was my job to be an advocate for the minority set-aside to firms designated as minorities under the 8(a) Program.

Mr. LAFALCE. Could I just ask one question? What year, when he said HEW?

Mr. OFFORD. I retired in 1978.

Mr. LAFALCE. I see.

Mr. OFFORD. So I have been retired for a while. What I did was after I retired, I started my own consulting firm, consulting to firms who were trying to get or had contracts with the Government, because they needed that kind of help, the ones who had contracts.

Even though I had the supposed authority to select any procurement for minority set-aside, I found it very discouraging to over-

come the built-in prejudices of the program managers and some of my bosses.

As an example, when I would inform program managers within my Department that I had decided to set aside a particular requirement for the 8(a) firm, management would come up with excuse after excuse as to why a minority 8(a) firm could not possibly perform the requirement or the task.

Although these 8(a) firms had been certified by the Small Business Administration, in some cases program managers would withdraw their requirements. In some cases, if my boss found that the contract was over $25,000, that manager would try to convince me that the requirement was too large for a minority firm. When, in fact, small contracts are harder to perform since the fixed costs are the same as larger contracts. Therefore, this would make the profit margin smaller and the risk to perform harder.

It seems as though the mind set is that minority-owned firms should not be allowed to make larger profits. Even after contracts were awarded, some Government contract managers would try to make the contract harder to perform by changing specifications without a contract modification to compensate for the increased work effort.

This was done with veiled threats that if the minority contractor reported the increased work to the contracting officer, it would jeopardize any future contracts.

Another way to avoid minority contracting was to keep modifying a contract with a minority white firm, using a unique specification that only the majority vendor possessed, which was not necessarily needed to the requirement of the end product. Management used this unethical method to eliminate the bidding process, thus eliminating fair and equal contracting opportunities for minority-owned firms who were not able to bid competitively.

These are some of the kinds of things that happened while I was contracting specialist.

I feel that the SBA has done very little to protect the interests of minority-owned firms who were 8(a) certified and then did even less to prevent management from denying fair and equal contracting opportunities to minority-owned firms who were able to bid competitively.

Enforcement of all small business laws and regulation was not done because management had no incentive for allowing fair treatment to minority-owned firms. I recommend that, you heard this before, so we talked about this together, I recommend that the community task force be set up and given oversight of the 8(a) Program somehow. I don't know what the details would be. This special task force would be allowed to function as a subset of the Small Business Administration.

If the 8(a) Program is eliminated, though, those who have applied and never received contracts should be given maybe some kind of special exemption to be able to bid on contracts on a set-aside basis, and I will explain that if somebody asks a question. At this time, the system is very mismanaged. Thank you.

Chair MEYERS. Thank you very much.

[Mr. Offord's statement may be found in the appendix.]

Dr. George La Noue.

Ms. MILLENDER-MCDONALD. May I ask a quick question for clarification?

It appears to me the three of you, somewhere all of you in your presentation are suggesting that you do not want to end 8(a) Programs, you just want to mend them. That is what I am hearing in your presentations. So, you are not here to eliminate this program, but to help to improve upon it.

Mr. OFFORD. Absolutely. For me, absolutely.

Ms. FORD. Since I have been out there getting contracts on my own for 15 years, ending it would not affect me in any way, shape or form.

Ms. MILLENDER-MCDONALD. You are not suggesting that we end it, just to improve upon it. Am I correct in your presentation?

Ms. FORD. I would definitely say end it, simply because with a system as broken as badly as this one is, sometimes you have to start from scratch in order to correct the situation.

Ms. MILLENDER-MCDONALD. It doesn't appear to me you have any foundation from which you gather that statement.

Chair MEYERS. I think that is clarification. Let's go on. You will have your opportunity later to question, Ms. McDonald. I don't mean to rush anybody. We have had these people wait so long.

Dr. La Noue.

TESTIMONY OF GEORGE R. LA NOUE, DIRECTOR, POLICY SCIENCES, UNIVERSITY OF MARYLAND-BALTIMORE COUNTY, POLICY SCIENCES GRADUATE PROGRAM, BALTIMORE, MARYLAND

Dr. LA NOUE. Thank you, Madam Chair. Good afternoon. My name is George La Noue. I am Professor of Political Science, Director of the Policy Sciences Graduate Program, and Director of the Project on Civil Rights and Public Contracts at the University of Maryland, Baltimore. I have served as trial expert for the plaintiffs in challenges to racial preferences in contracting programs in Columbus, Ohio, and Philadelphia, Pennsylvania, and Federal courts have just recently within the last month struck down those programs on the grounds that they did not have appropriate factual predicates and violated the equal protection clause.

Currently, I am serving as expert witness for the plaintiffs in the case, *McCrossan v. Cook,* in New Mexico, which is a challenge to the contract set-asides by the Department of Defense.

In addition, I am working for a number of State and local Governments which are attempting to create the appropriate factual predicates for minority business programs. So, I am working for both plaintiffs and courts and local Governments in trying to find a path in this very complex area of what would be a constitutional minority business program.

I am here today principally because a colleague, John Sullivan and I, have written a history the SBA programs' use of the concept of presumptive eligibility, and it is that concept that I want to focus my testimony on. With the Committee's permission, I would like to put that article in the record, rather than going over it in any detail at all.

Chair MEYERS. Without objection.

Dr. LA NOUE. Presumptive eligibility is the key to the concept of the 8(a) Program. I think it is important to understand that less than 1 percent of all the minority businesses in the country are part of the 8(a) Program, and once those firms are certified by 8(a), they have a competitive advantage, not just vis-a-vis white-owned firms, but against other minority-owned firms.

Mr. LAFALCE. Doctor, just for clarification, 1 percent of what?

Dr. LA NOUE. Of all of the minority businesses in the country, are members of the 8(a) Program. Presumptive eligibilities is the concept around which participation in the 8(a) Program is built. While there is a requirement of economic disadvantage as well, the rules are exceedingly permissive.

In construction, for example, the firm size limitations make 98 percent of the construction businesses in the country eligible. Businesses with annual revenues of $100 million are in the 8(a) Program. We have talked about the ownership requirements, but because they exclude the worth of one's residence and one's business and because it is not clear how one's spouse's assets are included, the fact is that if you can be in this program with assets so defined of $750,000, the reality is all but the people who are really considered wealthy in this country can meet the economic standard. Therefore, the real screen in the 8(a) Program is not economic disadvantage, but social disadvantage. For that screen, presumptive eligibility is the key.

Presumptive eligibility involves a very large presumption indeed. Put simply, it assumes that American business owners can be classified into two groups on the basis of their race and ethnicity by the Federal Government. Owners in the first group are presumed to be socially disadvantaged and entitled to benefits.

Owners in the second group are presumed to be socially advantaged and excluded from these benefits. In practice, presumptive eligibility for the 8(a) Program means that two business owners with identical economic status, have gone to the same schools, live in the same community with the same business histories, would be treated by SBA very differently because of their race or ethnicity.

For the business owner who is in the presumptively eligibility group and meets the economic criteria, admission to the 8(a) Program and its access to billions of dollars of contracts annually will be a major competitive advantage. For the business owner in the nonpresumptively eligible groups, admission to the 8(a) Programs requires proving by clear and convincing evidence that he or she has suffered "chronic racial or ethnic prejudice or cultural bias".

In practice, this is a major barrier guarded by a very unsympathetic SBA bureaucracy. According to the documents given to us by SBA as a part of the *McCrossan* case, in fiscal year 1994, of the 5,628 8(a) firms, 9 of them were owned by white women, 9 of them were owned by disabled persons, and 8 of them were owned by white males. So, this is by no means a race-neutral program; it is very clearly a race-conscious program.

Which are the presumptively eligible groups? In my testimony on page 5, I indicate the list. I don't want to embarrass anybody, but I suggest that if you look at that list, a number of us in this room would not recognize and not be able to locate where some of these countries are. The Federated States of Micronesia, Tuvalu,

Kiribati, the Maldives Islands. Anybody who can claim ancestry from those areas can be considered presumptively socially disadvantage in this country.

While the history of discrimination against some of these groups is well-known, the SBA list is not an exhaustive list of groups that has suffered discrimination in the United States or have other forms of social disadvantage. Many of the groups on the SBA list are relatively recent arrivals to the United States and there is little, if any, evidence of any systematic bias against them. Nevertheless, a business owner who can claim membership in any of these groups is legally considered socially disadvantaged.

It is not certain that the SBA now knows or can reconstruct how some of the groups in the presumptively eligible list actually got there. In a deposition from the *McCrossan* case, the SBA official who the Government identified as knowledgeable about the origins of presumptive eligibility, conceded it would be sheer speculation about the criteria used in the past by that Agency.

The article that Mr. Sullivan and I have written based on the Freedom of Information Act documents goes through the whole history of which groups have been included and which groups have not been. In the eighties, the SBA turned down Hasidic Jews, women, service-disabled veterans and Iranian Americans, admitted Indians, Tongans, Sri Lankans and Indonesians to presumptively eligible status.

Historical records show some very active lobbying, the intervention of some prominent Members of Congress and the Carter White House. What it does not show is any principled base of decision-making or any use of any objective data to determine which groups should be on the presumptively eligible list and which should be excluded.

Some of the groups included are at the socioeconomic bottom of our society, while others, measured by education, income, and business formation rates are at the top. Facts about individual group characteristics were apparently irrelevant to the SBA's decision.

Now, as you all know, the constitutional law in this area has changed dramatically. After the Supreme Court's decision in the city of *Richmond v. Croson* and *Adarand v. Pena,* any use of racial classifications must be based on factual identification of discrimination against the group favored.

As the Supreme Court declared in *Adarand,* all racial classifications imposed by whatever Federal, State or local Government actor, must be analyzed by the reviewing court under strict scrutiny.

In other words, such classifications are constitutional only if they are narrowly tailored measures that further a compelling Government interest.

Now, the record, I think, will show that the concept of presumptive eligibility has been based on both illegitimate notions of racial stereotyping and racial politics, and *Croson* makes it very clear that that is not an appropriate basis.

Presumptive eligibility in the 8(a) Program is not intended as a remedy for any pattern or practice of discrimination in Federal contracting. No such record exists despite, of course, in any Government as large as this one there have been occasions of that. But

the records of any pattern or practice of discrimination by Federal procurement officers against anyone or all of these groups does not exist.

Nor since 8(a) contracts potentially cover everything the Government buys, are the racial classifications in the 8(a) Program intended to remedy discrimination in any particular industry.

If 8(a) is based on any theory at all, then presumptive eligibility was intended to compensate for societal discrimination. But that has been an invalid justification for the use of racial classifications since the *Wygant v. Jackson* decision in 1986.

Until last summer's *Adarand* decision, Federal minority business programs have been shielded from judicial scrutiny and consequently there are few relevant precedents. But in the only time an appellant court has examined presumptive eligibility, the concept fared poorly.

In 1991, in *Milwaukee County Pavers v. Fielder,* Judge Richard Posner, writing for the Seventh Circuit said in discussing presumptively eligible, this means that the State is conferring a significant benefit, access to the presumption of social and economic disadvantage that is the key to valuable entitlement, on the grounds that *Croson* forbids a State to use without establishing that the purpose is to rectify discrimination.

The State can, if it wants, redistribute wealth in favor of the disadvantaged, but it cannot get out from under *Crosan* by pronouncing entire racial and ethnic groups to be disadvantaged.

The whole point of *Crosan* is the disadvantaged diversity or other grounds for favoring minorities will not justify governmental racial discrimination, and then he added other than by the Federal Government. This was a pre-*Adarand* decision. Only a purpose of remedying discrimination against minorities will do, and the courts have now told us that that kind of discrimination has to be specifically defined.

Since that case, the Judiciary has become much more critical of the use of racial classifications in a variety of settings and has specifically expanded strict scrutiny to Federal programs. In *Adarand,* racial classifications were called odious, pernicious, and constitutionally suspect.

Presumptively eligible in the post-*Crosan-Adarand* legal world is an anachronism which is not based on anything like the factual predicates courts are now requiring for minority business programs on the State and local level. Courts have made it clear that rights belong to individuals, not groups.

Congress should move now to replace this obsolete concept of presumptive eligibility with a program that targets aspiring entrepreneurs from disadvantaged backgrounds of any race. That should be done before the courts eliminate the concept of presumptively eligible in the 8(a) Program as it is now configured.

Thank you.

[Dr. La Noue's statement may be found in the appendix.]

Chair MEYERS. Thank you very much, Dr. La Noue. The Chair recognizes Jeffrey Rosen.

TESTIMONY OF JEFFREY ROSEN, ASSOCIATE PROFESSOR, GEORGE WASHINGTON UNIVERSITY SCHOOL OF LAW AND LEGAL AFFAIRS EDITOR, THE NEW REPUBLIC, WASHINGTON, DC

Mr. ROSEN. Thank you, Madam Chair. My name is Jeffrey Rosen. I am the Legal Affairs Editor of the New Republic Magazine, where I write about constitutional issues. I am also an associate professor at the George Washington University Law School, where in the spring I will be teaching constitutional law.

I am honored by your invitation to testify about the constitutionality of the 8(a) Program in light of the Supreme Court's *Adarand* decision.

Let me begin by sounding a few notes of caution. There are important disagreements among members of the *Adarand* court that would make confident predictions about judicial performance irresponsible.

Discerning Justice O'Connor's mind, for example, is never easy, least of all for Justice O'Connor herself. I also respect the administration's effort to refine the 8(a) Program in light of the *Adarand* decision. This is a difficult task, and I think the administration has undertaken it in good faith.

Finally, the broad categories of Federal set-asides are mandated by Congress, and unless Congress repeals the set-aside laws, the President, of course, is constitutionally required to enforce them.

Nevertheless, as a constitutional matter, I am not convinced that the administration's proposed reforms, for all their good intentions, can resolve the tensions between the 8(a) Program and the *Adarand* decision.

Here is the nub of the constitutional difficulty. Recent decisions, for better or worse, suggest that courts will only accept affirmative action programs in Federal procurement if there is concrete evidence of discrimination against each of the relevant minority groups in each of the industries and regions with which the Federal Government does business. But the administration does not propose to collect this evidence with the precision that courts are likely to require.

In its proposal to reform affirmative action, issued last May, the Justice Department properly notes that courts have identified six factors in an attempt to define the elusive term that the courts have called the "narrow tailoring prong of strict scrutiny."

These factors include whether race is relied upon as the sole factor in eligibility, or whether it is used as one of many factors; whether any numerical target is reasonably related to the number of qualified minorities in the applicable pool; and the extent of the burden imposed on nonbeneficiaries of the program.

To its credit, the administration has frankly conceded that these constitutional tests call into question at least one Federal procurement program, the so-called rule of two, under which contracting officers can limit biddings on particular contracts to minority firms only.

Remember how the rule of two operated in practice. The State of New Mexico, for example, is about 50 percent Hispanic American, and yet the Department of Defense, in its effort to satisfy national goals set by the Small Business Administration, set aside

virtually all of its road building contracts at the White Sands military base, which is the largest military base in the country, for minority-owned construction firms.

Now, it is easy for us to recognize the rule of two as the antithesis of narrow tailoring. Race is the sole factor in eligibility. Numerical targets, which amount to 100 percent set-asides, have no relation to the availability of qualified minorities. Finally, the burden on the excluded nonminorities which is complete exclusion, couldn't be more dramatic.

Faced with likely defeat in court, the Clinton administration announced in October 1995 that it would repeal the rule of two. But the administration then announced that the Department of Defense would continue to set aside the same contracts for the same minority firms under a panoply of different Federal programs, most notably the 8(a) Program, which it continues to defend.

Now, in many respects, I want to suggest today, the 8(a) Program, which the administration defends, is hard to distinguish from the rule of two, which the administration repealed. Both programs insulate certain racial groups from competitive consideration with other racial groups, using race as the decisive factor rather than as a plus factor in assigning public benefits, and thus violating a distinction that Justice O'Connor herself has found crucial.

Both programs are employed to meet Federal goals that often have little connection to discrimination suffered by the particular minority groups in particular regions of the country. Because the Federal Government makes no attempt in establishing its annual goals to account for the availability of minority firms in a particular industry or geographic location, the only way for Agencies to meet their goals is to concentrate minority contracting in certain fields, such as construction, where minority firms actually exist.

Tacitly acknowledging that the 8(a) Program in its current form will be hard pressed to survive close judicial scrutiny, the Justice Department proposes to reform it. The administration proposes to set limits, which it calls "benchmarks" for each industry with which the Federal Government does business. According to the proposals, "Each industry benchmark limitation will represent the level of minority contracting that one would reasonably expect to find in a market absent discrimination or its effects."

The administration proposes to use census data to determine the capacity of firms operating in each market that are owned by qualified and available minorities, and then it proposes to adjust this figure upward to reflect "the estimated effect of race in suppressing minority business activity."

But the figure that the administration seeks is metaphysical, not empirical, and no State has convincingly calculated it. In Texas, for example, the State tried to suggest that low percentages of self-employed minorities and high percentages of discrimination lawsuits might indicate that minority business formation had been suppressed by discrimination. But the General Services Administration refused to accept the claim, conceding that business formation may be affected by cultural factors that have little to do with discrimination.

The most obvious weakness of the administration's proposal is its refusal to reexamine the Achilles heel of the 8(a) Program, its reli-

ance on a list of groups who are presumed to be socially and economically disadvantaged.

To satisfy standards that Justice O'Connor articulated in the *Croson* case, the administration would have to undertake a arduous empirical task indeed. It would have to look for discrimination against each group or subgroup included in the current set-aside program for each service that the Federal Government purchases in every State in the Nation.

But in its May 23 proposals, the Justice Department has decided not to do this, and in practice, of course, as Dr. La Noue has testified, it is difficult to produce evidence of systematic discrimination against many of the groups on the list with that degree of precision.

Recent court decisions have made the administration's task more daunting still. On July 21st, the U.S. Court of Appeals for the Third Circuit in the *Contractor's Association of Eastern Pennsylvania v. The city of Philadelphia,* struck down the city's contracting goals for African-American-owned businesses. Judge Stapleton, writing for the court, distinguished between three separate kinds of discrimination: Discrimination by prime contractors against subcontractors; discrimination by contractors associations against prospective members; and discrimination by the city against prime contractors.

Chair MEYERS. Mr. Rosen, if there is anything that you could submit for the record and summarize your testimony, I hate to crowd you into 5 minutes, but it is about the only way we can get through this. We have had another vote called, and I would like to hear from Mr. Banerjee before we take the vote. So, if you could conclude in the next few seconds, I would appreciate it.

Mr. ROSEN. I would be pleased to conclude, and I will submit the rest of my testimony.

I do want to end on the note of caution with which I began. As Members of Congress deciding whether or not to repeal the 8(a) Program, you have no obligation to engage in the mystical enterprise of reading judicial tea leaves. Instead, you surely have the right and responsibility to make an independent constitutional judgment about whether or not you believe that affirmative action in Federal procurement as it is currently administered to be consistent with the requirements of the Equal Protection Clause. If you find yourself more convinced by the arguments of the *Adarand* dissenters, which are powerful arguments, and consistent with judicial restraint, then your constitutional fears may be assuaged.

Thank you.

[Mr. Rosen's statement may be found in the appendix.]

Chairman MEYERS. Thank you very much, Mr. Rosen.

Mr. Banerjee is from my district and we are very pleased to have you here. I didn't know until this morning that you were going to be here. I am sorry if we made you miss your airplane. Mr. Banerjee.

TESTIMONY OF TAPAN BANERJEE, FOUNDER AND PRESIDENT, TAPANAM AND ASSOCIATES

Mr. BANERJEE. Thank you for recognizing me. Again, my name is Tapan Banerjee. I am the founder and President of TapanAm

Associates. We are located in the Kansas City area. I have about 25 years experience as a licensed professional engineer. I really appreciate the opportunity to testify before Small Business Committee today on behalf of my company and express my strong support for the SBA Program, 8(a) Program.

I would like to talk about my business area within the 8(a) Program, which is architectural and engineering design, and which is different from the construction business. I would like to talk about our successes in this program.

We have been in business for 13½ years, and we are a design firm. We started with offering structural and civil engineering services for 6 years before we had the opportunity to join the 8(a) Program in 1989. Since then we have grown considerably offering multidiscipline architectural engineering services. Before the 8(a) Program we had six people, now we have about 32 people in-house.

I just wanted to mention that the remarks which I am going to make, some of them are my own and some are from others who voiced their opinions in my district. I would like to go over those, too, as we go along.

For anyone who is involved in altering or terminating the 8(a) Program, it is important to understand the basic premise that, still today, there is not an equal playing field. There have been many improvements, as there still must be, but it is simply not reality to think that every minority entrepreneur has the same opportunities to succeed in the business world as their nonminority counterparts.

As I mentioned, our architectural and engineering business is a very competitive business. It follows the Brooks bill, and that is what the Federal Agencies follow, which stipulates that the selection is based on qualification. So, the first thing that comes to mind when we wanted to get into the Federal Agency business is without the Federal project experience, how can we build our qualification portfolio to compete for the Federal contract?

In my experience, I found I was an outsider in the "good old boy" network, which is still prevailing in my area, and we did not receive the opportunities to get any substantial projects to grow until we got into the 8(a) Program.

I would like also to mention how my firm got into the transition. We were fortunate to receive considerable exposure and experience on Federal architectural engineering design projects working as a consultant to large firms who had to meet a contractual goal up to 5 percent for SDB firms. This transitional experience into Federal design projects and the 6 years prior business experience before we joined the program helped us to take the full advantage of the 8(a) business development program.

Since then, which is after 1989, we have successfully provided design services to Federal Agencies as the prime consultant. We have since received several commendations for the quality of our work and have received various awards from the SBA.

I would like to mention that 8(a), in our experience is essentially an opportunistic program for business development. The following few comments will clarify some of the misconceptions that people have and people have expressed when I have talked to them about the program.

The 8(a) Program is not a handout. The program only introduces us as a viable business enterprise to Federal Agencies and like any other business scenario, we still have to market our services, convince the Agencies that we could do the work well to give us the first job.

Again, 8(a) is based on competitive Brooks bill selection process. Federal Agencies evaluate qualifications of at least three firms before a final selection is made. There is no sole source in our arch-engineer 8(a) procurement process. For example, we recently won a design contract from a Federal Agency. We had to compete with 50 other firms to win one of the two contracts awarded to 8(a) firms on a nationwide competition.

Again, the 8(a) Program does not help minority firms to receive repeat business. SBA is there to introduce us and help us financially. That is where it ends. Agency's project managers do not invite back firms because they are in the 8(a) Program. It is up to the 8(a) firms to win repeat business with quality and efficient professional service.

Eight(a) has given us the opportunity to stabilize our business, which was up and down for about 5 or 6 years doing small projects, and helped to create a track record as the prime design consultant to clients. Presently, 65 percent of our contracts are non8(a), and we have 2 years left in our program.

Like any other business, we feel we have earned recognition from our Federal Agency clients. What we think the 8(a) Program has done to us is to give us the opportunity to develop our business and given us the confidence to win projects with other clients.

Chair MEYERS. I am going to have to ask you to conclude, not because the light is red. I would give you another 30 seconds, but we have about 5 minutes left to get over to the floor for a vote. The vote is the last vote of the day, and it is final passage of the Transportation Appropriations Act. We will resume when we come back.

We will recess for a few minutes and be back as quickly as possible.

[Recess.]

Chair MEYERS. You may have 30 seconds, Mr. Banerjee. The light was red when we left. I didn't want to cut you off without giving you an opportunity to conclude.

Mr. BANERJEE. All right. As I was saying, we are not afraid of graduating, because SBA's role was to introduce us to the Federal clients but we developed relationships with them. Therefore, we still will have those clients when we graduate and still go out and compete in the open market to win other clients.

Also, I wanted to tell very quickly that firms like us also create jobs for minorities. The percentage of minorities employed by large firms are not even close in comparison to minority firms. We have about 40 percent minorities and we also have 20 percent women. In all, we create jobs for all Americans as a small business.

I just want to let you know, if you think financial management of minority business is easy, please think about this: We had to wait 10 years in business before we got our first line of credit. Without a line of credit, you cannot manage payroll, hire people, and have the capital that we need to grow.

I just wanted to mention that I am really amazed that you are spending all this time and energy for just 3 percent of the work for minorities in the marketplace. That just really is something to think about when I go back and talk to the people what I saw in Washington, all this energy and the money being spent, and you are our representative, and you are fighting against only 3 percent. But I oppose H.R. 3994, the Entrepreneur Development Program, because it takes the drastic step of repealing this program which has proven to work.

The bill offers managerial and other technical guidance to small businesses through a modified 7(j) Program. This proposal would be of little value.

Chair MEYERS. Mr. Banerjee, I am afraid we are going to have to move on. I appreciate so much your coming in today. I know the percentage is very small. What I am speaking for is an end to sole-sourcing and a program that is compatible with *Adarand* and some of the other court decisions. I am not one of those that has voted against civil rights programs. I have voted for everything that has been in front of me. I also am not against outreach and assistance for people, but $6 billion worth of sole-sourced contracts, when you say it that way, it sounds like more.

Mr. BANERJEE. In the A/E business we do not have sole-source programs. We are always competing per qualification based selection (QBS). I do not know much about other areas of the 8(a) business. I just want to comment——

[Mr. Bannerjee's statement may be found in the appendix.]

Chair MEYERS. May I recognize Mr. Steve Farinha. You are President of Farinha, Incorporated, and where are you from?

TESTIMONY OF STEVEN FARINHA, PRESIDENT, FARINHA, INC.

Mr. FARINHA. Thank you, Chairwoman Meyers, members of the Small Business Committee for the opportunity to submit testimony today in the 8(a) Program. My name is Steve Farinha. I am the President of Farinha, Inc., d.b.a. Paragon Construction.

To answer your question, we are in Auburn, California, on the West Coast, and I have always been a registered Republican. Today, I would like to testify about my company and the significant contributions that the SBA 8(a) Program has made to our success. I believe my company is a model example of what the 8(a) Program was intended to promote.

Let me give you a little background about myself. I was raised in a community of farming and agriculture, so I learned at a very young age if I wanted something I needed to work. While in school, I fell in love with the building industry and decided when I grew up I wanted, that is what I wanted to do.

So, in 1983, I founded Paragon Construction with a pick-up truck, a dog and $500. I had a dream I wanted to construct buildings. Then came an eye-opener. In the construction industry, it takes capital and surety credit to operate a commercial construction company. Without those two key ingredients, you cannot succeed.

Every time in my life I have encountered an obstacle, I have somehow attempted to make something positive out of the situation. So, I went to my parents and told them that I needed some

assistance. They mortgaged their house to help me out. But this was, in itself, was not enough for the bonding companies.

So, my bonding line was very small and with it I was not able to build a company due to lack of capital and surety credit. At the time, we had an annual volume of about $400,000 by 1988.

In 1988, I approached SBA for assistance and learned about the 8(a) Program. I was certified in May of 1989 and received my first contract in 1991. It took us 2 years to get our first contract. But from then until now we have grown to a staff of over 1,700 employees with over three offices.

Our current volume is approximately $17 million. People always want to know what our business mix is of 8(a) versus non8(a). I heard a lot of that today. I am happy to say our 8(a) sales account for approximately 35 percent of our annual volume, and 65 percent of our annual volume is non8(a), as you would call it competitive, and some of the 35 percent is also competitive. So, it is not just 35 percent of sole source.

Some of our current customers are the Air Force, Navy, Army, Coast Guard, General Services Administration, Veterans Administration, Social Security Administration, and National Guard. We have received numerous letters of commendation from our customers. You have a couple that we submitted today on that.

We believe that if someone will give us one opportunity to let us demonstrate that we can perform a quality project at a fair and reasonable price, we can keep that customer and develop a long-lasting relationship, as we have demonstrated. We have won numerous awards in the past few years as well, one being recognized as the 8(a) regional contractor of the year.

Also, we are active in our local community, participating in events such as career day for kids and local civic groups. I cannot stress enough how essentially the 8(a) Program has been for my success. The 8(a) Program, plus hard work, always equals success.

One of the key aspects of the 8(a) Program is that it provides diversity within Government contracting which in turn maximizes competition and ultimately provides the Government with higher quality goods and services at competitive prices.

H.R. 3994 kills the 8(a) Program. This bill does not attempt to reform the 8(a) Program. It simply repeals SBA's contracting authority. The 8(a) Program enables socially and economically disadvantaged persons to compete for Federal contracts.

Absent real contracts for minority firms to enter, to contract and perform, participation in development assistance programs becomes merely an academic exercise, befitting neither the small business nor the Federal Government.

H.R. 3994 provides no substitute for the 8(a) Program. The bill offers managerial and technical guidance to small businesses. This is already provided by SBA. H.R. 3994 provides no comprehensive substitute for the most important component of the 8(a) Program, the opportunity to compete for a project.

The program is a foot up, not a handout for small business. 8(a) is a business development program designed to help small firms become sufficient and competitively viable. In order to become an 8(a) firm, businesses must demonstrate a potential for success, and that

is why 8(a) has been a time-worn success. It creates jobs and promotes economic growth.

[Mr. Farinha's statement may be found in the appendix.]

Chair MEYERS. Thank you. Thank you very much. I would like to ask a few questions to start out here. Ms. Stewart, you have been in the 8(a) Program for quite a few years. Do you have evidence in the form of recommendations or commendations on your company's work from non-8(a) work that you have performed? What kind of evidence have you taken to the SBA that you could perform this work?

I might ask also, have they given any recommendations to you about non 8(a) contracts that you might bid on?

Ms. STEWART-VEAL. Your first question is, yes, I do have recommendations from various Government Agencies, Federal Government Agencies. They are recommendations of contracting officers that are satisfied and also state that work was completed on time, in a timely fashion. They would highly recommend my company to continue to do other contracts for the Federal Government.

Chair MEYERS. All right. How many years have you been attempting to get an 8(a) contract? Are you certified into the 8(a) Program?

Ms. STEWART-VEAL. Yes, I am. I have been attempting for the last 4 years.

Chair MEYERS. For 4 years?

Ms. MILLENDER-MCDONALD. Madam Chairman, may I follow up on a question? You indicated in your presentation that you have been awarded several contracts, not that of 8(a) contracts. One being from $2,500 to $10,000, and one being $20,000. Yet, it is my understanding in looking back on information that I have received, you have been offered a contract through the 8(a) Program that you refused.

Why did you refuse that and why do you then feel justifiable in saying that this——

Chair MEYERS. This is not coming out of my time, Ms. McDonald.

Ms. MILLENDER-MCDONALD. I understand that, Madam Chairman. Thank you so much.

Ms. STEWART-VEAL. I am glad you asked me that question. First, for the record, I didn't get a clear introduction of my qualifications and credibility. First of all, I am a master electrical contractor. So, when I was certified in this program in 1992, I was certified as a 1731 code, which is electrical contractor.

To answer your question, that particular solicitation or project from General Services Administration in which they requested my company to negotiate a contract with them for 8(a). That particular contract had nothing — I am sorry, was where they wanted me to go out and find a general contractor, and I would work with the general contractor for this particular project.

At that time, I was up against the wall. I didn't know what to do. So, I decided to terminate that particular offer.

Chair MEYERS. I will reclaim my time and say that I don't know where you got your information, Ms. Millender-McDonald.

Ms. MILLENDER-MCDONALD. I got it from my staff who did the research work.

Chair MEYERS. I would like to ask Dr. La Noue and Mr. Rosen a question. I know that it is difficult to speculate what the court is going to do, but in your opinion, is there any way that the 8(a) Program is compatible with the recent court decisions with *Adarand* and the other recent court decisions?

Dr. LA NOUE. In my view, the program has a clear racial classification. It is not targeted toward remedying any specific discrimination, and Congress has not established a compelling basis to remedy any discrimination by any aspect of Government procurement. So, lacking that foundation, it would seem to me unlikely that it would survive. But I don't make my living predicting what judges are going to do, and you can make arguments on the other side.

Chair MEYERS. Mr. Rosen, you wrote recently regarding the administration's benchmark proposal. Now, as I understand it, the Government under this proposal would attempt to establish the amount of discrimination that has affected certain groups and then apply these findings to establish levels of expected performance for these groups.

Do you believe such an effort would meet strict scrutiny? It sounds to me unworkable.

Mr. ROSEN. I think it is difficult to imagine actually how the figure would be arrived at. Recently, Madam Chairman I was reading the proofs of a new book by Christopher Edley, who, of course, served as the President's Coordinator of the Affirmative Action Task Force, an extremely provocative book.

Even Professor Edley concedes the difficulty of discerning this number. He talks about the analytical difficulty of figuring out how many entrepreneurs there would have been but for discrimination. He says, "economic attempts to answer the question have raised since the 1989 *Croson* decision from abysmal to crude, and it will be a steep, uphill climb to get much better.

"If you think personal wealth has something to do with becoming a successful entrepreneur, then you have the problem of very little census data to make useful comparisons. If you want to further control in each industrial subsector for education, age, various sorts of professional experience — which ones — the mind boggles."

I think this is a candid acknowledgment of just how difficult it would be to arrive at the figure, even if one set out to do it. I think that would make it more difficult to persuade a court.

Chair MEYERS. Well, I have more questions, but I may submit them for the record. I will yield at this time to Mr. LaFalce.

Mr. LAFALCE. Thank you. I think it is always, to put it mildly, a bit difficult to divine what the Supreme Court will do. Assuming you know who the Members of the Supreme Court are going to be at the time that the issue in controversy goes before them. That is to put it mildly.

First of all, Ms. Veal and Ms. Ford, if I were to summarize your remarks, I would say your chief concerns are based upon the fact that you did not obtain 8(a) contracts, and had you obtained 8(a) contracts, you would probably not have been as concerned about the program. But for some reason, unbeknownst to me right now, some reason, SBA did not award 8(a) contracts to you. Perhaps if

there were more 8(a) contracts to go around, they would have been able to.

Perhaps if you really didn't have competition in the noncompetitive program with other 8(a) contractors for a sole source, you would have got them.

With respect to Professors Rosen and La Noue, can we accept as a given that approximately 50 percent of the 8(a) contractors are blacks, approximately? Can we stipulate to that?

Dr. LA NOUE. I think that is correct, yes.

Mr. LAFALCE. Fine. Do you have any difficulty whatsoever in establishing presumptive eligibility for blacks? Do you think that there would be a constitutional difficulty with that? If we found, for whatever reason, that there had been, first, a history of discrimination against blacks within the United States, and, second, if we could find pursuant to the new rules being promulgated by the SBA in the Federal Register that the number of black contractors in given areas and given industries, Federal contracts, are not commensurate with what they ought to be in the absence of specific discrimination?

Dr. LA NOUE. Congressman, every person in this room knows that there has been an evil history of discrimination against African-Americans. We can get over that hurdle, yes. But the test the court is using is much more precise than that. The next question would have to be, is there any evidence of contemporary discrimination by the Federal procurement system against African-American entrepreneurs.

Mr. LAFALCE. I am not sure if that is the exact test that you articulated. What about the tested vision by the new or proposed Federal regs looking at the percentage of contractors in a given area that are getting contracts as opposed to the percentage of contractors of a minority persuasion available in a given area and a given industry? This is the effort that is being made by the Justice Department and the SBA to make absolutely sure that the 8(a) Program can withstand the structures of *Adarand.* It is a good faith effort. What do you think of it?

Dr. LA NOUE. Congressman, the tests articulated in *Croson* are comparing qualified, willing and able minority businesses.

Mr. LAFALCE. This is a different case than the *Adarand* case.

Dr. LA NOUE. I understand that. But I believe when one is doing an analysis of the factual predicate, that the *Crosan* concepts will be the concepts that will be applied.

Mr. LAFALCE. *Croson* was quite reliant, as I recall, on the lack of any finding by the local municipal legislative body, as opposed to the findings of fact by the Federal legislative body. There is a bit of a difference there, is there not? No findings of fact by a local legislative body, and findings of fact by a Federal legislative body.

Dr. LA NOUE. Congressman, there were findings by the Richmond City Council as there were findings by the Philadelphia City Council and by the Columbus City Council. The findings were not appropriate. They were not adequate.

If I could go back to the question——

Mr. LAFALCE. What standard of review did the court use with respect to the local legislative findings and what standard of review

would the Federal judiciary use with respect to findings of the Federal legislative body?

Dr. LA NOUE. I think *Adarand* says the findings are the same, strict scrutiny.

Mr. LAFALCE. All right, I can certainly accept strict scrutiny. But what quality of evidence? Is later deference to be given to the findings of the Federal legislative body under the Constitution with regard to strict scrutiny than the findings of a local legislative body? What would your answer to that argument be, and Mr. Rosen, what would your answer be?

Dr. LA NOUE. It seems to me that the deference that ought to be given turns on the quality of the evidence that is produced.

Mr. LAFALCE. Who determines the equality of the evidence? The legislative body or the court?

Dr. LA NOUE. I believe the courts will review it.

Mr. LAFALCE. De novo?

Dr. LA NOUE. I think they are certainly going to ask whether the Congress has made certain types of findings.

Mr. LAFALCE. If Congress had made findings, would the court examine those findings de novo, or would they ask simply whether or not there was substantial evidence or some quantum of evidence on which they would have to defer to the findings of the Federal legislative body? Mr. Rosen?

Mr. ROSEN. Congressman, I think you put your finger on, of course, the crucial question. It would be silly to pretend we know how this will turn out. We have four justices, the dissenters of the *Adarand* court, who say that the deference that Congress is entitled to receive under Section V should make a difference. And, of course, Justice O'Connor also talked about deference.

Analytically though, it is hard for me to imagine exactly what form the deference would take. If strict scrutiny really means strict scrutiny and not intermediate scrutiny, then presumably societal discrimination would not be enough. You would still need to define the discrimination precisely, and that is the why the Philadelphia decision is so interesting, because, it examined discrimination against African-American contractors, distinguishing with remarkable precision — and I am not endorsing this, I am just describing it — distinguishing between discrimination against prime contractors, against subcontractors, by Government officials against prime contractors, and by the contractors' association against their members.

It is conceivable, it seems to me, that even under Section 5 deference, Justice O'Connor, who as you suggest, really will be the only one who can answer this question for us, might go through the motions of deference, and still conclude that the discrimination had not been defined precisely enough to satisfy her. But you will have to ask her that.

Mr. LAFALCE. Your advice earlier was to proceed legislatively as we would divine constitutionally.

Mr. ROSEN. No, Congressman, I have made no legislative recommendation at all. I tried to describe the law as I best understood it.

Mr. LAFALCE. Toward the end you gave some counsel to the legislature.

Mr. ROSEN. I was trying to endorse the line of questioning you are suggesting, which is if you disagree with the constitutional analysis of the majority, and Congress is certainly entitled to believe that it deserves more deference, then your doubts will be less severe than if you were merely applying *Adarand* as the law.

Mr. LAFALCE. Justice O'Connor did agree with the four in the minority that deference should be given to the findings of the legislative body? Did she not?

Mr. ROSEN. The language is unclear. Of course, she did overrule Metro Broadcasting. To the degree it is relied on, deference is an argument for intermediate scrutiny. So, I don't think that her wishes can be discerned with crystal clarity right now.

Mr. LAFALCE. There are decided differences between Metropolitan Broadcasting and the instant situation, are there not?

Mr. ROSEN. There are, of course. Metro Broadcasting had to do with diversity in the broadcasting industry. This has to do with contracting. The crucial question of whether congressional deference means the courts are less suspicious is not clear from the *Adarand* opinion.

Mr. LAFALCE. Thank you.

Chair MEYERS. I am going to go to Mrs. Millender-McDonald next, because she missed her opportunity to question on the first go around.

Ms. MILLENDER-MCDONALD. Thank you, Madam Chair. I did pose a question to Ms. Stewart initially. What she suggested were contracts that she could very well expand her business, contracts that were from $2,500 to $10,000, and yet you refused to accept an 8(a) contract in the amount of $20,000.

In your presentation you suggested you had not even been given the award of a contract. So, you answered that question. The next one is to Ms. Ford.

Ms. Ford, your assertions that the 8(a) Program is corrupt, unethical, wrongdoings, what do you base that on?

Ms. FORD. I base that on the fact that I applied for 8(a) certification as a socially disadvantaged woman-owned firm. I was informed that I did not possess technical and managerial skills. The area that I was specializing in was grass-cutting, grounds maintenance, walking behind a lawn mower, and holding a weeder. That was the explanation given to me.

The same person who was involved in that decisionmaking 15 years later now working with the SBA, with the Veterans Administration, denied me fair and equal contracting opportunities. It appears that the same person felt the same way, even though it was a competitive bid, my company's bid was $200 less than the white-owned firm. I was still denied fair and equal contracting opportunities. Both times SBA was fully aware of the situation.

Ms. MILLENDER-MCDONALD. Thank you.

Chair MEYERS. Thank you. I am going to allow two Minority Members to question, and then I am going to take a quick question in between, because I am the only one that is here. I would like to ask Mr. Rosen a question and Dr. La Noue. It has seemed to me that when the administration did away with the Rule of Two, that he really did absolutely nothing because he didn't take away the bid preference.

In other words, what he said was everybody can bid, but we are going to keep the bid preference there. So, that if you go through the expense and the hard work of bidding, you are still going to run, and you happen to be Caucasian, you are still going to run up against the problem that somebody can have a bid that is 10 or 15 percent higher than yours and still get the bid.

I think doing away with the Rule of Two was really kind of a semantic change and not a real change. I would like to have you comment on that.

Mr. ROSEN. Well, again, I do believe the administration is acting in good faith. I respect their efforts to try to refine these programs. I think what you have pointed to, Madam Chairman, is the rather elusive distinctions between the various preferences the administration has reviewed. In affirmative action task force report, there is an interesting graph about ranges of preferences, from what are considered hard preferences, actual set-asides, to softer preferences, like bid preferences, and the softest of all, things like bonding help and reduction of lending requirements and so forth.

In practice though, as you suggest, it is often hard to see the difference between a hard set-aside and an intermediate bid preference because in practice it can be decisive, the 10 percent preference will determine who gets the bid. That is why I agree with you that it is analytically difficult to distinguish the programs the administration has retained from the ones it has repealed.

Chair MEYERS. In one of the laws where we supposedly were reforming the 8(a) Program, the Conference Committee specifically mentioned assistance to poor Appalachian whites. Over the years, this Committee has regularly discussed the discrimination faced by women. Yet there has not been any difference in articulation by the SBA of the discrimination suffered by these individuals opposed to members of the presumptive group.

I think people could tolerate this program better if it were based on economic disadvantage. But just to say, well, this group is obviously economically disadvantaged, but we are not going to consider them, but this group we will consider, even though they might be millionaires, because they are minority, and that is the tremendous weakness of this program.

Mr. LAFALCE. Madam Chairman, the law was changed about two decades ago to go from the disjunctive "or" to the conjunctive "and". It must be socially and economically disadvantaged. It cannot be simply the one.

Chair MEYERS. I understand. That is the weakness of the law and the weakness of the program. It should be based on an economic need if it is based at all. It ought to be based on an economic need, but not to say that a poor white person from Appalachia who graduated from high school is ineligible, whereas a minority with a $1 million who graduated from Harvard is eligible. There is something wrong with that.

Mr. LAFALCE. But that is not the law. It is just not the law.

Chair MEYERS. It is socially and economically disadvantaged, and those who are minorities are automatically considered socially disadvantaged. Everybody else has to go to court, and I think there have been 16 Caucasian women, and I think maybe 1 or 2 Caucasian men.

Mr. Clyburn, you are next.

Mr. CLYBURN. I really want to ask a question, but I don't want to lose all of my time. I find it rather interesting that we seem not to understand that there is a cause and effect in all of this. If we can't reach the conclusion that you ought to come into the program only if you are socially disadvantaged, those things that lead to the status of socially disadvantaged ought to be taken into account.

I don't know anybody who knows the history of this country, and I happen to be a founder of a small business, a business which still continues as I serve in this Congress, and, hopefully, my daughter will keep it open until the people decide I should no longer be here. I know something about a small business. I know something about how to start a small business. I also know something about what you are up against when you are not considered socially disadvantaged by income, but by complex.

I don't know how we can sit here and pretend that doesn't happen in this country. We have a member of this panel, Iva Clayton, who did not get 8(a) certification because she was not considered to be socially disadvantaged. But you are all about the same complex. So, I don't think that makes the program unethical and corrupt.

I would like to ask two questions. Ms. Ford, I would like to know from you, would you say that people who go around burning churches or people who make the whole society racist, if this one guy that you know that went from one Agency to another applying his own problems to the findings of the Agency, you think that makes a program corrupt, because you got one bad guy in it?

Ms. FORD. I have been in contact with more than one bad guy regarding problems with the SBA program. My Congressman's office also tried to straighten out or resolve the situation, regarding denial of fair and equal contracting opportunities. Even his legislative aides were given quite a runaround.

Mr. CLYBURN. Who is your Congressman?

Ms. FORD. Congressman Wynn. He is here today.

Mr. WYNN. Can I respond?

Mr. CLYBURN. As long as you don't take it out of my time.

Chair MEYERS. Let's complete Mr. Clyburn's question.

Mr. CLYBURN. I want to ask Dr. La Noue a question. That is why I brought Mr. Wynn with me.

Sandra Day O'Connor in her writings in *Adarand* revisited a statement made by Thurgood Marshall, I believe, in Fuller Love. Don't hold me to where it was. It may have been Bakke, but I think it was Fuller Love, when Mr. Marshall said that he considered strict scrutiny to be fatal.

Now, Ms. O'Connor says strict scrutiny in theory is not fatal in fact.

Dr. La Noue, do you agree with that?

Dr. LA NOUE. Yes. In amplifying her answer, she used as an illustration the *Paradise* case where the Alabama State police force had a history of systematic discrimination against African-Americans and refused judicial orders to do anything about it.

Mr. CLYBURN. If you recall, they did something about it. When they did, they started terminating one for every one they hired.

Dr. LA NOUE. The court had to finally use racial preferences to end that system. But I don't think that *Paradise* provides a very good basis for a Federal contracting program, because there isn't anything comparable to the history in Federal procurement of the behavior of the Alabama State police force.

Mr. CLYBURN. I beg to differ with you. I come from South Carolina. First to secede and last to come back in, where the Confederate battle flag, or at least the Navy Jack continues to fly on top of the State House. That makes a statement for me. It makes a statement to my children. It also says to all of us that such shenanigans as we saw in *Paradise* still continue, and it continues in the contract world as well.

I can cite you case after case where these things continue to happen, where people are given contracts only to be evaluated 3 months down the road or 6 months down the road. With all kinds of accusations and trumped-up charges, are then terminated. That is the same kind of mentality that led to *Paradise,* and it exists today in the contracting world. I beg to differ with you.

If you believe, as she does, that strict scrutiny in theory is not fatal in fact, then I don't understand why you can say to us today that there is no way that you can demonstrate that discrimination will, in fact, take place or does, in fact, take place in contracting.

Dr. LA NOUE. Congressman, I didn't say that you couldn't demonstrate it. It is my reading of the records that it hasn't been demonstrated. I think perhaps the Congress really ought to do that. It ought to identify particular Agencies, particular procurement officers, particular contracts where it feels discrimination at the Federal level has taken place.

Mr. CLYBURN. Will you agree that is exactly what the Justice Department is attempting to do now? Isn't that what we are trying to do as we work our way through some way to fashion an administrative response to *Adarand?* Don't you think that we are getting out in front of the horse here by short-circuiting that with these hearings we are having today, these recommendations we are entertaining?

If you believe we ought to be doing that, and you agree that the Justice Department is, in fact, undertaking that, what are we doing here today?

Dr. LA NOUE. I am not privy to all the Justice Department is doing. I do know the documents the Justice Department is introducing in the cases that are challenging racial preferences in Federal contracting. They are not producing that kind of evidence. If it is in process, we are about to see it in 3 weeks or 6 months; that is one thing. But so far there has not been any of that kind of evidence produced in these cases.

Mr. CLYBURN. Madam Chair, I think he testified earlier this morning that they received at least 1,000 responses to the attempts to try to build a response to *Adarand.*

Are you privy to those 1,000 responses?

Dr. LA NOUE. No, Congressman, I haven't seen them.

Mr. CLYBURN. I would suggest maybe you ought to become familiar with it, because that is what we are doing if more than 1,000 people have responded, and we are attempting to try to fashion a fair and proper response to — this affirmative action business has

a long history in this country. The first one was called for — that was an affirmative action program, and we have now come up to the third affirmative action program in this country, and every time we attempt to do something to correct the current affairs of past discrimination, we get all of these——

Chair MEYERS. We are going to have to terminate. Thank you very much.

Mr. Wynn, I am going to give you a minute or two to respond since your name was mentioned.

Mr. WYNN. Thank you, Madam Chair. I do want to make a statement with regard to Ms. Ford.

You have probably about 200 firms in my State, and the fact is, not all of them get contracts, and I work to try to get contracts. But the fact of the matter is, there is a competitive element and some do not get contracts. As a result of that competitive element, the overwhelming number of 8(a) contractors in my district are fully supportive of this; absolutely no question.

With respect to Ms. Ford's case, she did run into a bad situation, and we are going to try to correct that. There is certainly room for improvement, but I see no evidence because we had individual administrators who did carry out their functions properly.

So, I just wanted to indicate that for the record. We will continue to work with Ms. Ford as long as the program exists, and I hope it continues to exist, because as my colleague, Mr. Clyburn, has pointed out, there is a history of racial discrimination that is abundantly clear, that for some reason it seems the courts are trying to deny it.

We now have proof it was sanctioned by the U.S. Government notwithstanding the equal retention clause of the Constitution allowed for segregation, legalized segregation within the States, and that to me is a very ample credit to what we are trying to do with the 8(a) Program.

Chair MEYERS. A quick comment. We have talked to a number of 8(a) participants with similar complaints to Ms. Ford and Ms. Stewart Veal who decided that there may be some potential retribution for breaking ranks with the minority community's support of 8(a).

Now, I don't know how accurate that is or not. I just know that we contacted a lot of people and heard it over and over, and, consequently, when these people agreed to come and testify, not saying they were going to support the bill or anything but yes, that there were problems with 8(a), we did not reveal their names until this morning because of some concern that we felt about some pressures that would be being brought. So, that is all I am going to say about that.

Ms. WATERS. That is pretty serious. What do you think is going to happen?

Chair MEYERS. As I say, I don't want to — what is done is done, but I think they fear that they would not get 8(a) contracts, that they would forever destroy their possibility of getting an 8(a) contract by even mentioning there were problems in the program. Number two, they feared some retribution against their businesses generally.

Ms. WATERS. By whom?

Chair MEYERS. I don't know.

Ms. WATERS. Well, I am sure that now that they are here testifying, you are going to help them.

Chair MEYERS. I beg your pardon?

Ms. WATERS. I really do believe that if you really think that, you ought to assist them. You, as Chairlady of this Committee, ought to step forward and really help them out.

Chair MEYERS. All right.

Ms. Velázquez.

Ms. VELÁZQUEZ. Madam Chair, I really resent statements and comments that are made here about those who fear not coming forward because they fear retribution. You brought here three witnesses again to criticize the program, and yet we have to fight to get two witnesses that are supportive of this program. I am sure that there are hundreds and hundreds who have participated in the 8(a) Program that are willing to come forward and testify as to the good things that this program has done for them.

Also, I have a preoccupation, and that is the lack of participation from your side. It seems they agree with us that this hearing has no sense in terms of, we cannot finish or repeal this program, that we should mend it but not end it. I think that the lack of participation from your side is a signal that they disagree with you on this issue.

I would like to ask Mr. Banerjee: Could you please elaborate on the barriers you found when you first started your company and try to compete for contracts.

Mr. BANERJEE. I started the business like any other person, just start a business and see what I could do, and soon I found out that all I could get was smaller projects because I am an outsider from the old boy network and we struggled for 6 years doing little projects with very little backlog of work to make us hire people of qualifications and had litle chance to grow.

So, there was no future, not at that stage, being small, with little money. The 8(a) Program offered me a prime contract, and we were successful on the first one. We gained confidence which led to other successful ventures.

Ms. VELÁZQUEZ. How competitive do you expect to be after you graduate from this program?

Mr. BANERJEE. As I mentioned, most of the 8(a) firms who have been successful with the 8(a) Program have acquired, through their success, clients which happen to be Federal Agencies.

In our case, we also work outside the 8(a) Program and have acquired other clients. So, when we graduate, we are not afraid to go back to those Agencies who know us very well to compete for projects, because, if I may mention this, that we have earned our reputation, we were told by a client when they called for reference that TapanAm is one of the top five structural engineering firms they use. There was no mention anywhere that TapanAm is a minority firm and is in the 8(a) Program.

In other words, the 8(a) Program provides opportunities to qualify and do a job as capable as anybody else, and, when they graduate, they are just another firm.

Ms. VELÁZQUEZ. The legislation we have before us will repeal the 8(a) Program and the SBA's contract authority, and will replace it

with technical and managerial assistance. How helpful do you think that will be for you?

Mr. BANERJEE. For me, absolutely nothing. We have already matured ourselves. We have full-time accountant. We have learned from large firms, mentor firms, how to manage our business. So, as far as that is concerned, that is not going to be any help.

Ms. VELÁZQUEZ. Mr. Farinha, were you in business before you received the 8(a) contract?

Mr. FARINHA. Yes. We started business in 1983, and we got into the program in 1989. It took us 2 years to get our first 8(a) contract.

Ms. VELÁZQUEZ. Do you believe that Agencies review your market and work plans as strictly as they would those of nonminority firms?

Mr. FARINHA. Yes, I have a couple of good examples of that that happened with us that didn't happen at the time. One was the Air Force, where we went and we marketed our firm as an 8(a) firm. The contract officer had a job assigned for us. It was a small fence projects. It was about an $86,000 fence project. We went out and performed the project in 6 weeks.

What we weren't aware of until months afterwards was, at the same time they ran a test on us because they thought our price was going to be too expensive. They put the same project, one identical to it, out to bid, hard bid, sealed bid. That project did come in $3,000 less initially. The difference was, the project took 4½ months to finish whereas ours took 6 weeks and there was $8,000 of change orders.

So, the net effect was, our price, the negotiated price, initially was lower than the finished product, and we did it in less than half the time.

It happened on another project also at the Veterans' Administration. We went in with the price. It was a rush job because they had to open up a hospital wing. We did the project, and it was also 7 weeks. The second phase of it came up, and we thought we were going to do it. The project architect stated he felt he could get a better price putting it out on the street, full and open competition. They did that, in fact. They put it out full and open competition. That project took 5 months to complete whereas ours took 7 weeks. The net result was, it was $15,000 more than our final contract.

So, in both instances the contracting officers came back to us and said, "We wish we would have trusted you and did this whole thing, but we had to check for ourselves, and fact the price was fair and reasonable and we are getting quality work."

Chair MEYERS. I think our last questioner of the day is Mrs. Holmes Norton. Then we will adjourn this hearing.

Ms. NORTON. Thank you very much, Madam Chairwoman.

Dr. La Noue, just for the record, you made so much of how various microminority groups got on the list, and I have no defense to make of that and I have no knowledge of that. But I think all of us would take notice of the fact that racial discrimination in this country has been a matter of color, and therefore it is quite conceivable that somebody who comes from someplace else and arrived in the country yesterday could experience the same kind of discrimination that I and my own family have experienced who have

been here for many generations. That simply is for your future reference.

As to the constitutional arguments that both of you have made, as a lawyer who continues as a tenured professor at Georgetown University Law Center, I can only say to you — and this is nothing you had to do with — that I am always edified by constitutional arguments when I hear both sides. It is very hard to evaluate the constitutional position when I hear only one side. I want to hear the other side even when I disagree with the other side.

I don't know how to evaluate what you said except to say that this is a body that historically and traditionally pays no attention to whether a matter is constitutional or not, because it is a separate branch of Government. We go ahead and do what we have to do, and the courts will do what they have to do. That certainly was the case for years in this body.

I can tell you, growing up in the segregated city of Washington, DC, that when people raised the notion that racial discrimination enforced by this body was unconstitutional, nobody gave them the time of day. It took the Supreme Court to tell this body anything about that kind of discrimination, and I think the Supreme Court will get around to it in this case as well.

On the matter of presumptive eligibility, let me ask you both whether you believe it is correct to assume that two groups, blacks and Hispanics, have, and continue to, experience discrimination as a group?

Dr. LA NOUE. Discrimination by whom? That is, who is committing the discrimination, Government procurement officers?

Ms. NORTON. You are free — by anybody in America as a group.

Dr. LA NOUE. Well, Ms. Norton, I think——

Ms. NORTON. I didn't ask you to rephrase my question; I asked you to answer my question. I put it to you again. Is it correct to assume that people who are black and Hispanic, as a group, will tend to encounter discrimination, as a group, more than, for example, people who are white, as a group?

Dr. LA NOUE. If you are referring to societal discrimination, that is an assumption I would make. Whether that is true when they confront Government procurement officers——

Ms. NORTON. I am going on to the next question. Here we have a presumptive eligibility for a program. The testimony this morning was as to qualifications to get a contract that was a matter of individual eligibility and individual merit. That is to say, you get into the ball game based on the presumption that you have just indicated was not an unfair presumption to make about the group, but when it comes to the contract that was the unrebutted testimony this morning, people are, in fact, judged on an individual basis.

Dr. LA NOUE. The circle of competition is dramatically reduced, because only this handful of contractors, even among minorities, let alone everybody else, is considered, because the 8(a) Program is so small.

Ms. NORTON. Are you both aware that the majority of SBA setasides go to whites?

Dr. LA NOUE. You will have to tell me more about that.

Ms. NORTON. I just told you the facts.

Chair MEYERS. I beg your pardon?

Ms. NORTON. Of the various set-asides across the Government, the majority of those go to whites and not to blacks.

Dr. LA NOUE. They just go to small businesses.

Ms. NORTON. Yes, small business set-asides, overwhelming majority.

Dr. LA NOUE. In those contracts there are no racial preferences.

Chair MEYERS. They are——

Ms. NORTON. Madam Chairman, is this my time or not? I asked the witness, and he can respond, as I understand the rules of this Committee.

Can you eliminate racial discrimination in a program designed to eliminate racial discrimination where the greater majority of those in the program are white?

Dr. LA NOUE. I guess the question is, could the program be redesigned to focus on persons with certain objective economic and social disadvantages, of which the number would probably be disproportionately but not exclusively——

Ms. NORTON. That was not my question. My question is if, in fact, there is a problem that has been identified in the society, that some people — let's assume blacks and Hispanics — have experienced specific discrimination, discrimination specifically addressed to them based on their race and ethnic origin, is it possible to fulfill the congressional intent to eliminate the specific discrimination for them if they are operating in a program where the majority of those in the program are white? That is my question.

I do not wish my questions rephrased; I wish them responded to.

Chair MEYERS. I wouldn't begin to know how to respond to that though.

Ms. NORTON. I didn't ask you that question, Madam Chairman; I asked the expert.

You are here as an expert. That is my question. What is your answer?

Dr. LA NOUE. The program, of course, includes more than blacks and Hispanics; it includes——

Ms. NORTON. What program?

Dr. LA NOUE. The 8(a) Program. It includes a substantial and growing number of Asian Americans.

Ms. NORTON. If you feel more comfortable answering my question, by adding other groups, then add them, but please answer my question.

Dr. LA NOUE. Well, forgive me, but it seems to me that this is not a program that was aimed at addressing the kinds of discrimination that Government programs can address. The Court has told us that societal discrimination is not a permissive basis for Government use of racial classifications.

Ms. NORTON. You are saying there has been discrimination by the U.S. Government against blacks and Hispanics and other people of color in procurements and that the only discrimination there has been has been discrimination in the society at large, otherwise known as societal discrimination?

Dr. LA NOUE. I don't know, and I don't think the Government has made the case yet.

Ms. NORTON. Thank you very much.

Chair MEYERS. Thank you all very much for being here.

This was a contentious and difficult hearing. I appreciate your participation just tremendously. I remain totally unconvinced, but I will keep listening to absolutely everybody. We are adjourned.

Mr. LAFALCE. Madam Chairwoman, what date do we have our hearing?

Chair MEYERS. That is what I said we will have — we had two representatives from you this morning——

Mr. LAFALCE. That is not my question. My question is, what date?

Chair MEYERS. I don't know. I have said to you I will take this under advisement. I have no idea what the floor schedule is going to be next week. I am complying with the guidelines of the House Parliamentarian, and I just can't tell you any more than that. We are adjourned.

[Whereupon, at 2:49 p.m., the Committee was adjourned, subject to the call of the Chair.]

APPENDIX

Statement of Congresswoman Eva Clayton
Before the United States House of Representatives
Committee on Small Business
Hearing on H.R. 3994, "The Entrepreneur Development Act"

Wednesday, September 18, 1996

Madame Chairwoman, today the Small Business Committee stands convened to hear testimony on the merits of H.R. 3994, "The Entrepreneur Development Act of 1996." As introduced, this bill will dramatically change the purpose and intent of the 8(a) program.

First, the bill would repeal the statutory authority for the 8(a) program; thereby, removing the contracting authority under which federal agencies award contracts to 8(a) participants. In its place the bill would establish an Entrepreneur Development Program that would enhance the 7(j) technical assistance component of the 8(a) program, without providing for a contracting mechanism.

Second, H.R. 3994 broadens the criteria under which applicants may enter the redesigned program. The bill does this by creating a new category of emerging small businesses -- which is defined as those firms that are owned by economically disadvantaged individuals or eligible groups and do not exceed 25 percent of the size standard for their respective industries -- and by eliminating the presumption of social disadvantage based upon racial or ethnic classification.

Proponents of H.R. 3994 argue that the provisions included in this bill will correct the most egregious and contemptible abuses of the 8(a) program, while retaining and broadening access to the program's established counseling and business planning outreach elements -- on a race-neutral basis. They argue that the 8(a) program, as presently conformed is replete with waste, fraud, and bureaucratic incompetence and has failed as a minority business development program.

To buttress this claim they argue that of the more than 6,000 firms currently participating in the 8(a) program, only 1% of these firms, the majority of which are located in the Washington, D.C. Metropolitan area, receive 25 percent of

the contracts awarded. In addition, they argue that the SBA has never "graduated" an 8(a) firm and that firms rarely if ever emerge from the program as "competitive businesses."

Underlying these systemic arguments against the 8(a) program, is a fundamental believe that the program is primarily a racial quota program designed to benefit specific racial groups at the expense of others. The program in its present form, therefore, is as the Chairwoman has said, "fatally flawed" and badly in need of "reform."

Combined with other so-called "reforms," proponents of H.R. 3994 maintain that this bill will construct a program which enables minority small business owners to participate more fully in the federal procurement process and diminish bureaucratic mismanagement, while not relying upon racial quotas or permitting a very few firms to be awarded a disproportionate number of contracts.

Sounds good doesn't it?

I admit, that were the abuses in the 8(a) program as onerous as some have made them appear, the bureaucratic ineptness so profound, or the bill so praiseworthy, I too would be before the Committee today extolling the virtues of H.R. 3994 and calling for the repeal of the 8(a) program.

However, Madame Chairwoman, thankfully, the abuses are not so onerous, the bureaucratic ineptness so profound, nor the bill so praiseworthy that I feel compelled to support this bill.

In fact, Madame Chairwoman, I feel just the opposite. I am offended and outraged by the continued mis-characterization of the 8(a) program as a corrupt and "fatally-flawed" program. I am appalled at the arrogance with which some have disparaged and sullied the reputations of honest businessmen and women. I am shocked at the ease with which some have fabricated or manipulated data to support their erroneous claims.

Rather than being a "fatally-flawed" program, as the Chairwoman has suggested, I believe that the 8(a) program remains a vitally important program. Yes, there is some abuse associated with the program. Yes, there is a measure of bureaucratic mismanagement that needs to be weeded out. Nevertheless, despite these minor problems, I deeply believe that the program is working. It

is working by increasing minority and women owned small business participation in the $203 Billion dollar federal procurement process. It is working by developing minority and women owned small businesses capable of thriving in a competitive environment. And, it is working by providing tens of thousands of people with well paid jobs.

Further, this belief is not simply based upon my intuition or a personal hunch, it is supported by impartial data. According to the Small Business Administration, in 1986 all small disadvantaged firms (including 8(a) participants) received $5 billion, or 2.7 percent of the $185 billion in total Federal contract dollars. By 1995, with a reemphasis on 8(a) and Department of Defense SDB contracting, such firms received $11.2 billion, representing 5.5 percent of Federal contract dollars of $202.3 billion. Without the 8(a) Program's award of $6.4 billion in FY 1995, total Federal contract dollars awarded to small disadvantaged firms would have aggregated $4.8 billion, representing only 2.4 percent of total Federal contract dollars. Moreover, at present there are over 6,000 firms participating in the 8(a) program -- 80 percent of which are located outside the Washington, D.C. area -- employing more than 157,000 people and paying approximately $100 million dollars in taxes.

Clearly, then, if one were to examine the 8(a) program on economic impact alone, the program will be seen as necessary to ensuring minority and women owned small businesses participation in the federal procurement process.

Upon what then do opponents base their claims that the 8(a) program is so profoundly flawed as to prohibit reform? As suggested earlier, opponents of the program base their opinion primarily upon three arguments. First, they maintain that the program is simply a racial quota system, awarding contracts on a sole-source basis without competition. Second, they argue that a few large firms located in the Washington, D.C. area are disproportionately awarded the majority of 8(a) contracts. Third they argue that few if any companies graduate from the program and are capable of thriving in a competitive environment.

Let me take a moment to address each of these issues. The first claim that the 8(a) program is a racial program is a misleading assertion. True, the program does award the majority of its contracts on a sole-source basis. However, sole-source as applied to the 8(a) program is not identical to sole-source in the regular procurement process. 8(a) firms must self-market their capabilities to Federal customers in order to have the opportunity to have the opportunity to

negotiate a sole source contract, competing against hundreds of other 8(a) firms. Competition in the 8(a) program, therefore is real and stringent. Indeed, 19 to 20 percent of 8(a) contracts were awarded on a straight-up competitive basis, whereas last year two large defense contractors were awarded sole source contracts -- in the true meaning of the word sole source -- in an amount greater than the sum of all the contracts awarded in the 8(a) program. In addition, participation in the 8(a) program is not limited to racial or ethnic minorities. Individuals who are not members of designated ethnic or racial groups may also participate in the 8(a) program if they can demonstrate that they are "socially disadvantaged."

The second claim made by opponents of the 8(a) program is that 1 percent of 8(a) participants, who are largely located in the Washington, D.C. area, received 25 percent of the contracts. While this is true, what critics fail to mention is that the federal government, quite simply, awards contracts where work needs to be performed. Therefore, given the concentration of federal agencies in the Washington, D.C. area, it is not surprising that their exists a disparity between the number of contracts awarded in the Washington area and the rest of the country. Moreover, the SBA has recognized this disparity and has taken administrative steps to correct it.

The final argument made by opponents of the program is that the SBA has rarely if ever graduated companies from the 8(a) program. While this claim does have an ounce of validity, it is far from accurate. Between October 1, 1992 and September 30, 1995 1,242 firms completed or exited the 8(a) program. Of these, 646 firms -- over 50 percent -- continued as thriving businesses.

Behind this statistical evidence is literally hundreds of businesses that graduated from the 8(a) program and continued to grow and expand. One such company is Shaw's Food Service, a North Carolina based catering company owned by my constituent Larry Shaw. Larry Shaw entered into the 8(a) program in 1974 and received his first contract two years later. In the early 1980's Shaw left the 8(a) program and continue to diversify his clientele and grow his business. Today, Shaw Foods Services is a multi-million dollar company employing close to 700 employees that has contracts with Howard University, North Carolina A&T, and R.J. Reynolds Tobacco company. For his success, Mr. Shaw credits the 8(a) program. He says that his company "benefitted from it [8(a)] right away. We were able to build an infrastructure, gain experience and establish a track record."

Accordingly, the criticisms leveled against the 8(a) program, if analyzed impartially and unbiasedly, have little if any basis. If anything, Madame Chairwoman, they point to the need for continued oversight and refinement of the program -- a process that the SBA has already begun. Even the GAO, in its testimony will testify that the SBA has instituted several administrative mechanisms that have increased the efficacy of the program and has eliminated much of the previous bureaucratic mismanagement.

H.R. 3994, however, does not reform or improve the 8(a) program. It guts it, leaving in its place a program which already exists in law and which increases the paperwork burden on small business owners. Reconstituted as the "Entrepreneur Development Program," this program is nothing more than an expanded 7(j) technical assistance program without the contracting authority of 8(a).

Madame Chairwoman, I submit that the changes included in H.R. 3994 are bad for minority and women owned small businesses. It is shortsighted, and it is harsh. I urge my colleagues to oppose this unnecessary and redundant bill.

Statement
Congressman Cleo Fields
September 18, 1996
HR 3994, The Entrepreneur Development Reform Act of 1996

Madame Chair:

It concerns me greatly that we are even having this hearing on HR 3994, the Entrepreneur Development Act of 1996 which proposes to amend the Small Business Act by repealing the 8(a) Contracting program. I agree that the 8(a) program needs adjusting, which the Administration and the Justice Department are currently doing, but by no means should the program be terminated.

In my state of Louisiana, there are 96 participating firms in the 8(a) program and they employ over 2,800 people. Furthermore, they generated more than ninety-one and a quarter million dollars in FY 1995. This type of economic stimulus is crucial in a state as impoverished as Louisiana. Socially and Economically disadvantaged businesses would not have the opportunity to contribute so generously to the economy if not for the 8(a) program. Before it was implemented, only 3% of minority businesses were given contracting consideration.

What must be kept in perspective is that contracts are not given to select firms, rather, successful 8(a) firms have to pass technical evaluations, devise marketing strategies and submit detailed proposals to demonstrate their competence. The 8(a) program is necessary to assist small businesses overcome the effects of discrimination which would otherwise make them susceptible to failure.

This crucial component of the SBAs effort to assist small businesses become and remain self-sufficient should be closely examined -- to improve it not to destroy it -- especially in light of the many successes it has reaped.

Opening Statement of Floyd H. Flake
House Committee on Small Business
September 18, 1996

GOOD MORNING LADIES AND GENTLEMEN OF THE COMMITTEE, AND TO THOSE PRESENTLY IN THE COMMITTEE ROOM. I AM HAPPY TO SEE SO MANY OF YOU IN THE AUDIENCE AS I THINK IT IS A CLEAR INDICATOR OF HOW MUCH INTEREST WE ALL HAVE IN THE PROGRAM BEING ADDRESSED TODAY. THE SMALL BUSINESS ADMINISTRATION'S 8(a) PROGRAM HAS INDEED AFFECTED MANY OF OUR LIVES, THOSE OF FRIENDS, FAMILY, EMPLOYERS, AND COLLEAGUES.

I WOULD NOT BE HAPPY WITH MYSELF MADAM CHAIRMAN IF I DID NOT MAKE IT UTTERLY CLEAR THAT I AM EXTREMELY CONCERNED WITH THE STRATEGY YOU'VE CHOSEN TO EMPLOY TODAY. THIS MAY BE AN UNDERSTATEMENT. FOR A PROGRAM THAT SIMULTANEOUSLY ADDRESSES TWO OF THE POSSIBLY MOST IMPORTANT ISSUES OUR COUNTRY FACES TODAY; RACE AND BUSINESS DEVELOPMENT, THE CASUAL AND CARELESS DISREGARD BEING SHOWN IS NOT ONLY DISPROPORTIONATE; IT IS OFFENSIVE.

I BELIEVE YOU HAVE CHOSEN TO TAKE THE "BABY WITH THE

BATHWATER" APPROACH HERE TODAY, MADAM CHAIRMAN. I AM SURE YOUR STAFF HAS BEEN SUCCESSFUL IN LOCATING SOME FORMER 8(a) COMPANY OWNERS, DISGRUNTLED FOR WHATEVER REASON. THEIR CONCERNS MAY BE VALID. BUT ANECDOTAL EVIDENCE OF SYMPTOMS HAS RARELY BEEN GOOD SCIENTIFIC CAUSE FOR DIAGNOSING A DISEASE, AND HAS CERTAINLY NEVER HELPED FIND A CURE.

AND THERE IS A DISEASE, MADAME CHAIRMAN, OF WHICH I AM NOT SURE YOU ARE AWARE. IT IS A DISEASE THAT IS AFFECTING CERTAIN MEMBERS OF OUR POPULATION WITH MORE DEVASTATION THAN OTHERS. I WILL NOT BE COY, MADAME CHAIRMAN. THE PEOPLE MOST NEGATIVELY AFFECTED ARE MINORITIES, AND THAT DISEASE IS JOBLESSNESS. THE RATE AT WHICH JOB AVAILABILITY IS DISAPPEARING IN BOTH OUR CITIES AND OUR RURAL COMMUNITIES IS APPALLING. VAST BLOCKS HAVE BEEN ABANDONED WHERE ONCE THRIVING BUSINESSES STOOD.

AND I CANNOT BELIEVE WE AS A BODY HAVE THE AUDACITY TO SIT HERE TODAY AND USE OUR POWERFUL SEATS IN CONGRESS TO ELIMINATE A PROGRAM THAT CAN LIST JOB AND

WEALTH CREATION AMONG MINORITY COMMMUNITIES AS ONE OF ITS ACCOMPLISHMENTS.

I BELIEVE THIS HEARING STEMS FROM A PROFOUND MISUNDERSTANDING OF BOTH THE PROGRAM AND OF THE PROBLEM THE PROGRAM IS SEEKING TO ADDRESS. THE 8(a) PROGRAM IS NOT A GIVEAWAY. IT DOES NOT ELIMINATE COMPETITION AMONG FIRMS. IT IS NOT EVEN THE MOST GENEROUS OF SOLE SOURCE CONTRACT PROGRAMS. AND IT CERTAINLY, IN NO LIGHT, COULD IT BE CHARACTERIZED AS A MEAL OF LOBSTERS DINNERS, AS THE CHAIRWOMAN HAS CLAIMED. WE **SHOULD** BE HERE TODAY PROPOSING SENSIBLE, POLICY-DRIVEN IMPROVEMENTS TO A PROGRAM THAT HAS BEEN LARGELY SUCCESSFUL IN EVERY WAY. THIS BILL, COLLEAGUES, GUESTS, AND MADAME CHAIRMAN, DOES NOT EVEN COME CLOSE.

Opening Statement
Honorable John J. LaFalce
Committee on Small Business
September 18, 1996

Hearing on H.R. 3994

Madame Chairman, forgive me if I dispense today with the customary opening words of thanks for the convening of a hearing.

I am deeply disturbed by your decision to hold today's hearing on the Minority Small Business and Capital Ownership and Development Program -- commonly known as the 8(a) program -- both procedurally and substantively.

The 8(a) program is important to and supported by many small business advocates, small business owners, and a sizable percentage of the members -- perhaps even the majority -- of this committee. It and its predecessors have been the cornerstone of several Republican and Democratic administrations' efforts to bring disadvantaged small businesses into the economic mainstream.

Procedurally, to hold a hearing on your widely-opposed bill to kill this program at the 11th hour in the 104th Congress is an approach to public policy making that can only lead to ill-considered results.

Substantively, let me assure you that, Committee Democrats, and perhaps some of our Republican colleagues, are ready to defend the obvious merits of this program in what I hope will be the last battle of this kind this year. The defenders of the less fortunate and the working class have already earned their pay during this Congress by resisting as committee after committee sought to dismantle programs that attempt to inject some fairness and dignity into the process whereby we distribute wealth and resources.

I am never one too proud to accept reinforcements for fighting the good fight. Let me, therefore, take a moment to officially welcome the newest members of the Small Business Committee on the Democratic side: Representatives Maxine Waters, Eleanor Holmes Norton, Jim Clyburn, and Xavier Becerra. I look forward to working with all of you and I encourage your active participation during today's hearing.

The 8(a) program was created in response to a tragic reality of American life: the inability of some individuals to participate in our economy because of who they are. Programs like 8(a) have not outlived their usefulness because

discriminatory treatment of certain Americans is not a thing of the past. It is small comfort to argue, as some do, that discrimination today is "only" subtle, or unconscious, or generational, or situational. The fact remains that discrimination exists. It affects the individuals with whom one associates, the businesses one patronizes, perceptions of who can do the job, and the ability to access capital on a fair and equitable basis. In other words, all of the aspects of doing business. The 8(a) program merely seeks to give firms a chance to rise above discriminatory barriers with the hope that, given this opportunity to develop, they will become competitive, viable firms in the open market.

8(a) firms are guaranteed nothing. They have to market themselves and provide their goods and services at a fair and reasonable price. They are required to compete among themselves for contracts above certain amounts. If their eligibility ends before they finish the full nine years in the program, they are terminated.

So-called "evidence" is endlessly trotted out to show how flawed this program is. Often-cited one is the view that too many contracts go to firms in too few geographic locations. Certainly the issue of geographic concentration merits examination. But I don't know of any other federal program that is criticized because of where private sector firms choose to locate. Indeed, buzz-words such as Silicon Valley and Route 128 have come into the English language based on the tendency of firms to co-locate for whatever business rationale drives them. Other examples include the concentration of financial services in North Carolina and New York, textiles and carpets in the Carolinas. I could go on and on. Indeed, Harvard Business School Professor Michael Porter has coined the term "clustering" for this tendency of like firms to co-locate, and he has documented that firms do so to go where the expertise is. More important and interesting for our purposes, however, is the fact that Professor Porter has found that this close proximity among firms is a factor in enhancing competition. Let us not be sidetracked by spurious problems.

That being said, I will not sit here today and pretend that there is no room for improvement in the 8(a) program. In 1988, I sponsored reform legislation that became law which underscored the business development nature of the program. In fact, it is precisely the fact that 8(a) is a business development program that ensures that it passes scrutiny under Adarand. Among other things, we established a maximum program time of 9 years, we introduced competition among program participants for larger contracts, and we created the business mix requirement wherein the percentage of 8(a) firms' reliance on 8(a) contracts must decline over time. I know that the current and former SBA Administrators have

made great strides in reforming the program, making it more business-like and bringing it into line with the program envisioned in the statute. The fact that the program has not always received this kind of attention from SBA officials in the past accounts in some measure for the program's problems, but legitimate beneficiaries of 8(a) assistance should not be punished for that.

I repeat, legitimate beneficiaries. As in any program, there are people who will come up with scams to profit unfairly from the 8(a) program. As you may know, for example, in 1988, this committee investigated a Kansas 8(a) firm called EDP, which received a $30 million contract for food processing. During my chairmanship, this Committee referred the matter to the Department of Justice, the FBI, and the SBA's Inspector General for follow-up regarding the possibly illegal benefit from this contract that accrued to several people, including individuals with very close ties to former Senator Robert Dole. Indeed, what apparently set this contract award in motion for EDP was a phone call from former Senator Dole to the then-administrator of the SBA. President Bush's administration did not act on the information we referred and the matter largely dropped out of the public eye. Recently, however, a key player in this drama has dropped his previous wall of silence and may now be willing to testify before the Committee as part of this hearing on the 8(a) program. I certainly expect that the Chair will work with us to develop the necessary information and answer the previously unanswered questions.

In regard to the timing of today's hearing, we all know that the Administration is in the midst of reviewing affirmative action in federal procurement programs to ensure that they comply with last year's Supreme Court decision in Adarand Constructors, Inc. v. Pena. An extensive proposed rule was published in the Federal Register in May by the Department of Justice, a public comment period followed, and the Department is now reviewing these comments prior to issuing a final rule. Why not wait to see the results of this reform process before taking drastic legislative action? Given that this reform process is on-going, today's hearing is not only ill-advised but meaningless in terms of any serious evaluation of the 8(a) program. No criticism leveled today is relevant, as the program we are examining is changing even as we speak.

In addition, the Committee has a number of programs under its jurisdiction which do require 11th hour attention. We should be using this time to work in a bipartisan manner on them rather than dividing into two opposing camps for a hearing on a controversial bill that has no chance of becoming law. In the handful of remaining legislative days, we still have to mark-up and present to the House the Small Business Investment Company bill and work with the Senate to finalize

the legislation reauthorizing key SBA lending and guarantee programs. I have to tell you, Madame Chairman, that your insistence on today's hearing can not but have a dampening effect on any spirit of compromise and cooperation among members on this side of the aisle, who you have to know would be upset by this hearing and the attack on this program.

At this point, I would like to submit into the record a letter from former Congressman Mfume, now President of the N.A.A.C.P., and previously a highly respected Memberm of this Committee, in opposition to this legislation.

Now, to proceed with today's business. I welcome all of the witnesses and I hope that their comments are constructive. One need not be especially gifted to find fault with something, but it usually takes the best and brightest to make something work better.

In closing, however, I would be remiss if I did not note my dismay about the imbalanced roster of witnesses the majority has structured.

As recently as yesterday afternoon, the majority still had not given us a list of witnesses nor even confirmed the number. We were only told that there would be up to 5 private sector witnesses speaking against the program and that we could invite 2 private sector witnesses. We had requested that our witnesses at least be placed on the appropriate panel and given a reasonable opportunity to present their views. We were assured that would be the case. This morning we find that they are now the last witnesses in a very long hearing. The reason no information was given on the Democratic witnesses was that our request for the names of the Republican witnesses was denied. Such discourtesy among Members on this Committee is unprecedented.

Therefore, Madame Chair, I am submitting to you a letter from the majority of the Democratic Members requesting, as is our right, a full day of Democratic hearings on this important issue.

STATEMENT of

CONGRESSWOMAN JAN MEYERS, CHAIR

hearing before

the COMMITTEE on SMALL BUSINESS

U.S. House of Representatives

"Reform of the SBA's 8(a) Program Through H.R. 3994, the 'Entrepreneur Development Program Act of 1996.'"

September 18, 1996

Today, for the third time during the 104th Congress, the Committee on Small Business has convened to review the impact of the Small Business Administration's Minority Enterprise Development Program which we commonly refer to as the 8(a) Program.

It is well known that I have long held grave concerns about this program, not only from the standpoint that it fails to provide the kind and quality of development assistance to disadvantaged small business that Congress intended, but also from the standpoint that its failing performance comes at a tremendous cost to the taxpayers.

This morning, for the first time in my memory, we will hear from small business owners who exemplify the kind of individual Congress really intended to benefit from 8(a), but whose stories are filled with disappointment, discouragement and personal loss. It has not been easy for these brave individuals to come forward and some of them have been intimidated and threatened with reprisal and blacklisting. I want to personally commend and thank each one of them for helping this Committee break ground today and truly get to the bottom of the problems plaguing this program. We also will hear from officials of the Small Business Administration and the General Accounting Office as well as independent experts and scholars who will speak to the program's performance and its Constitutionality.

Congress intended that 8(a) would utilize federal procurement to promote development of small businesses owned by socially and economically-disadvantaged individuals, and its enacting legislation put in motion a contract-letting mechanism within the Small Business Administration (SBA) through which federal agency purchases now worth about $6 billion are sublet, for the most part, uncompetitively as set-asides.

Under the shelter of the 8(a) umbrella, the reasoning went, eligible companies would have an opportunity to get on their feet, gain practical business experience, and at the end of a maximum of nine years, spread their wings in the competitive marketplace.

In practice, however, opportunity has been minimal for most of the 6,000 or so firms certified, who have found that a select few companies, though financially able, remain in 8(a) long after achieving a success level of which most struggling entrepreneurs

only dream. One prime example was recently found in the program history of a Washington-area computer hardware supplier, which last year tapped the 8(a) Program for a $97 million contract. Not surprisingly, this whopping order came in the last two years of the company's statutorily-allowed participation in 8(a), yet its own officers predict that it probably will take up to five years to complete the contract. As a columnist in the *Washington Times* wrote just last week, this company's owner is surely as disadvantaged as most people aspire to be.

This example offers yet another chapter in a growing volume of horror stories in which inside the beltway firms use 8(a) as a fast track to lucrative, multi-million-dollar contracts that no truly small nor disadvantaged business could handle. I refer here to three high-profile case studies of 8(a) abuse, which some of our more senior members will recall - l-Net and Tamsco, and of course, the nationally-publicized example of Wedtech.

By contrast, many firms who do win certification after lengthy battles with the SBA find the 8(a) well bone dry and never get a contract.

Congress has attempted to clean up the longstanding problems with this program through three major legislative overhauls in 1978, 1980 and the most substantial in 1988. Each time we have directed the SBA to increase oversight of this program to ensure that the program's benefits are distributed fairly and to guard against fraud and abuse. Nonetheless, more than a dozen studies by independent investigators, including the General Accounting Office and the National Academy of Public Administration, have

given the program poor and, in many cases, failing grades. General findings of these studies have concluded that 8(a)'s success in helping disadvantaged firms to become self-sufficient and competitive was minimal. More specifically, they found that only a fraction of 8(a) contracts awarded were bid competitively, that less than four percent of 8(a) firms emerge from the program as competitive businesses; that the top-50 firms doing business through 8(a) represent only one percent of the firms certified, and yet in one year that small group took a huge piece - in fact one quarter of the 8(a) business and finally that the SBA has allowed firms that clearly do not meet the program's guidelines as socially and economically disadvantaged.

At my request, the General Accounting Office has conducted another review of 8(a) and will bring an update of program performance in these critical areas, which I have just outlined.

This morning, we also will examine another very critical piece in this puzzle, which is the SBA's ability to manage this program. This Committee has spent hundreds of hours looking into 8(a) and attempting to get to the heart of the problems in this program. Repeatedly, the SBA has been either unable or unwilling to provide reasonable and timely answers to basic questions of managerial activity and program performance. Another telling example lies in the agency's failure to provide Congress an annual report of the 8(a) Program's performance, which is required by law on April 30. This year, that report was delivered to Congress 80 days late and finally arrived here only after I issued a press release highlighting the agency's failure to comply with the law.

This lapse of sound management has done little to improve the 8(a) Program's standing with Congress. More importantly, though, it suggests that we do not have a steady hand on the wheel of a $6 billion vessel - and that, in my view, is unacceptable.

Now, let me say to my colleagues that I did not come to Congress to eliminate programs or to protect programs embraced by special interests. But when a program fails to show ability to achieve its goals over the course of 18 years, I know that Congress has a responsibility to act. It is for that reason that I introduced H.R. 3994, the "Entrepreneur Development Program Act of 1996," which would sunset the 8(a) Program's predominantly sole-source contracting arm, while retaining and broadening access to its established counseling and business planning outreach elements. This approach would end, once and for all, the contracting shenanigans that the SBA and the participating agencies have engaged in to game the system and funnel billions of dollars to beltway insiders. It also would focus valuable business development assistance to the struggling, bottom tier of small businesses whose proprietors aspire to success rather than conspire to hide it.

Before we turn to the ranking member and our witnesses, I also want to address an issue which I am sure my critics will raise in short order: that is, that my proposal to repeal contracting under 8(a) will hurt women. Let's be clear: the 8(a) Program does not now and has never provided that women are presumed eligible for certification. Indeed, I should know, since in 1992, under the Democratically-controlled Congress, I introduced legislation to make all women eligible. I was defeated then because the same small group

of individuals who are defending the program in its current form today did not want to give one inch to a potential new group of eligibles. Furthermore, I am acutely aware of the enormous strides women have made in business and particularly small business, over the past 20 years. And I take pride in the fact that I have been a part of their advancement. But let me make it clear, women do not owe their advancement to the 8(a) Program. They owe it principally to their own hard work, determination and federal policies that have offered opportunity open to all women - not just those whose ethnic origin qualify them as eligible.

Finally, let me say that over the course of the past few months, I have personally met with representatives of some of the leading 8(a) companies. We have had frank discussions and I will reiterate publicly that, despite what my critics will say here today, I do not begrudge any of the contractors their success - and I do not offer my legislation as any sort of retribution. I offer it because there are too many of their peers who are equally qualified and deserving but who cannot get a foot in the door of this program.

Let me also make it clear that in my heart I do believe the intent originally behind 8(a) was very worthy. But after long deliberation, I have concluded that the program is fatally-flawed. The SBA cannot manage it and I doubt seriously whether the faculty of the Wharton School and the CEOs of the top 10 corporations in America could either.

As I reviewed the first legislative reform of 8(a), which Congress passed in 1978, I was struck by the words offered by Senator Sam Nunn as the other body prepared to move that bill. "If a firm can never succeed on its own without 8(a) contracts," the

Senator said, " it not only would be a cruel hoax on the firm itself, but it would also be a waste of valuable resources which could be applied to other business which eventually could be successful."

He added: "We must not allow the 8(a) program to simply be a rich-get-richer, poor-get-poorer program."

The facts speak for themselves. It is clear that, just as the Senator warned, a cruel hoax indeed has been perpetrated against far too many of those the 8(a) Program was intended to aid.

At this point, I recognize the Ranking Minority Member, Mr. LaFalce, for an opening statement.

Statement of Congresswoman
Millender-McDonald
In Opposition to the
"Entrepreneur Development Program Act of 1996"

Madam Chairwoman,

I have grave concerns about the negative impact that the "Entrepreneur Development Program Act of 1996" will have on the 17 businesses in my Congressional District who have qualified to participate in the Small Business Administration's (SBA's) 8(a) program, have conducted their businesses according to the rules and now they face elimination of the 8(a) program, at a time when the need for the program continues to exist. It is not possible to argue that these businesses operate in an environment devoid of the very discrimination that brought about the 8(a) program. The Congress created the 8(a) program with the presumption that certain disadvantaged groups (including African Americans, Asian Americans, Hispanic Americans and Native Americans) are "socially disadvantaged." Recent statistics indicate that this presumption remains true. Disadvantaged business owners receive approximately six percent of total federal contract dollars whereas disadvantaged individuals, as defined by the Small Business Act, constitute over 25 percent of the Nation's population. There is still a need for the 8(a) program, and we have a long way to go before we can begin to consider a gradual phase out of this important program.

The "Entrepreneur Development Program Act of 1996" is shamefully lacking in business development assistance which is the hallmark of the 8(a) program. The 8(a) program is one of the few government programs which meet the requirements of the Supreme Court's opinion in the Adarand case, which is the law of this land.

In all 8(a) awards, the contracting officer certifies that the contract prices charged by the 8(a) firms are "fair and reasonable." Through a negotiation between the contracting officer and the 8(a) firm, a "fair and reasonable" price is assured, as the contracting officer is under no requirement to give the firm the contract in the absence of this condition being satisfied.

As a new Member of this House of Representatives, I want to make clear that I am working to make sure that the taxpayers get value for the dollars that they send to the federal government. Eliminating the 8(a) program will cost the taxpayers more, and put hardworking Americans, like my constituents, out of work. Current 8(a) firms directly employ more than 157,000 people. The multiplier effect of these 157,000 jobs results in considerable additional employment through subcontractors and suppliers to 8(a) contractors. If there are problems with the 8(a) program; let's mend it, not end it.

The SBA is doing its part to improve the 8(a) program, having removed 371 ineligible firms from the program since 1994. An additional 200 firms have been reviewed and are proposed to be removed in the remainder of FY96.

In working cooperatively with the Office of the Inspector General, the SBA eliminated loopholes (indefinite delivery, indefinite quantity contacts) that allowed abuse of the program by non-competitive award of contracts in excess of competitive thresholds.

Consistent with the business development focus of the 8(a) program, the SBA has increased the level of competitive bidding within the program. The dollar value of competitive awards has increased threefold over the last three years.

The "Entrepreneur Development Program Act of 1996" does not address the needs of the American people. As much as I would like to walk into this hearing with an open mind, I cannot. This is a bad bill, and it must be defeated.

OPENING STATEMENT

for

Congressman Glenn Poshard

19th Congressional District

of Illinois

Small Business Committee Hearing

H.R. 3994

September 18, 1996

Madame Chairman, thank you for convening this committee hearing today on the "Entrepreneur Development Program Act of 1996". I believe this is a successful program and I am somewhat puzzled why we would want to eliminate it, and would like to take a moment to speak in opposition to H.R. 3994, and ask some questions after my statement.

The 8(a) program was implemented by President Johnson with the initial purpose of aiding distressed urban areas and creating more jobs. This program has proven to be successful and by all indications this trend will continue.

In my district alone there are four prime examples of successful 8(a) participants;

* B&M Construction Inc., which has seen a two million dollar increase in sales,

*Spates Construction Co., which in sales alone, has grown 1.5 million dollars,

*Fossie Brothers Inc. and R&E Midwest Sales Co. both have increased in sales by $100,000 in just a few months.

Granted, these are just a few examples of 8(a) participants, but it goes without saying that eliminating the 8(a) program would be detrimental to the growth of small business.

Before closing my statement I would like to address the panel with some concerns.

1. Why would you eliminate a program that has proven successful and helped so many economically-disadvantaged people become private entrepreneurs?

2. How much money did the 8(a) program receive in new sole-source awards as opposed to non-8(a) firms last year?

Madame Chairman, I urge my colleagues to consider the success of the 8(a) program and oppose H.R. 3994. I thank you for your time.

NYDIA M. VELAZQUEZ
12TH DISTRICT, NEW YORK

COMMITTEE ON BANKING AND FINANCIAL SERVICES
SUBCOMMITTEE ON HOUSING AND COMMUNITY OPPORTUNITY
SUBCOMMITTEE ON GENERAL OVERSIGHT AND INVESTIGATION

COMMITTEE ON SMALL BUSINESS
SUBCOMMITTEE ON REGULATION AND PAPERWORK REDUCTION

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STATEMENT SUBMITTED FOR THE RECORD
BY
CONGRESSWOMAN NYDIA M. VELAZQUEZ (D-NY)

HEARING ON H.R. 3994,
THE ENTREPRENEUR DEVELOPMENT PROGRAM ACT OF 1996

HOUSE SMALL BUSINESS COMMITTEE
SEPTEMBER 18, 1996

Thank you, Madam Chair, for holding this hearing and providing this opportunity to discuss and explore H.R. 3994 and its impact on the Section 8(a) Minority Small Business and Capital Ownership Development Program. This program has been essential in our fight against the discrimination that socially and economically disadvantaged persons face across this country.

As the 104th Congress winds down, the Republicans have once again targeted minorities and women for attack. While only representing 3.1% of total federal contracts, 8(a) is a valuable program to level the playing field for socially and economically disadvantaged businesses.

When the program was created pursuant to President Nixon's executive order in the early 1970s, the reasons to create the program were clear. Historically, minorities and women struggled to compete for federal contracts due to discrimination. Thus, Congress presumed that, in light of these groups' histories, the ability of members of these socially and economically disadvantaged groups to compete in the marketplace had been impaired.

Unfortunately, recent SBA statistics indicate that this presumption remains true. For example, disadvantaged business owners receive approximately 6% of total federal contract dollars while disadvantaged individuals, as defined by the Small Business Act, constitute over 25% of the country's population. Any minority or woman-owned business will tell you that the barriers still exist and that the 8(a) program is essential to at

least get the foot in the door of federal contracting.

Section 8(a) is a business development program designed to help eligible small businesses reach a point of self-sufficiency and competitive viability. To participate in the program, such firms must demonstrate a potential for success and must be owned (at least 51%) and operated by American citizens who are both socially and economically disadvantaged. All applicants must show they are "economically disadvantaged" in order to qualify for the program. The SBA makes no presumption of economic disadvantage when reviewing 8(a) applications.

H.R. 3994 would hurt, not help, America's minority and women-owned small businesses. The bill makes no attempt to reform 8(a): it outright repeals the program and provides no substitute program. The heart of the program has been SBA's contracting authority. Without this program, thousands of minority-owned firms simply would not have access to federal contracting opportunities.

To replace this minority business development program, H.R. 3994 provides for a modified Section 7(j) program that presently provides small businesses with managerial and technical assistance. This proposal is a pale alternative for a program that helps introduce businesses to federal agencies and that provides minorities and women with real opportunities to compete for federal contracts. Furthermore, H.R. 3994 fails to recognize the unique challenges and barriers that minority-owned businesses face, resulting in many firms having no access at all to federal contracts.

Minority and women-owned firms need opportunities not consulting. The core element of the 8(a) program distinguishing it from other business development programs is the contracting authority held by the SBA. It is through the actual hands-on performance of contract work by which companies develop the most beneficial experience. Absent real contracts for minority firms to enter and perform, participation in development assistance programs becomes merely an academic exercise benefitting neither the small business nor the federal government.

This legislation is just one more example of unfair and unjust attacks against minority businesses. A summary of H.R. 3994 distributed by the Chair was biased against the program and contained various questionable assertions about the program. Just last week, a freelance writer published

an article in the Washington Times newspaper that portrayed the program as ineffective and unfair. The article criticized one particular 8(a) company, the Digicon Corporation. Digicon was so disturbed by the assertions made about the corporation and its participation in the 8(a) program that it wrote to me to refute the damaging article. I am submitting the Digicon letter, dated September 16, 1996, into the record to give this company an opportunity to respond.

8(a) has been a key instrument in assisting minority and women-owned businesses to compete for and perform federal contracts. A total of 6,018 firms participated in the program in Fiscal Year 1995. The firms were from all fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam. These firms employed 157,019 employees in Fiscal Year 1995. These jobs, in turn, have had considerable positive multiplier effects by creating additional jobs and generating more economic activity throughout the United States. In 1995, 8(a) firms received $5.8 billion in federal procurement awards, had total combined revenues (including non-8(a) work) of more than $9.5 billion, and paid more than $100 million in federal income taxes.

Contrary to allegations by opponents of the 8(a) program, hundreds of minority-owned firms have successfully completed the requirements of the 8(a) Program. These firms have continued on their own to compete strongly in the marketplace without relying on 8(a) contracts and have favorable 8(a)/non-8(a) business mixes to demonstrate this. The impressive business mix, performance, and client base of Farinha, Inc. dba Paragon Construction and TapanAm Associates, Inc., both testifying today, attest to the value and effectiveness of the 8(a) program.

The 8(a) program has been attacked as an inside-the-beltway special interest program benefiting a few firms. However, the fact is that more than 80% of all 8(a) firms are located outside the Washington, D.C. area. These small businesses receive about 75% of all 8(a) contract awards.

Still, SBA has responded to these concerns. Last year, the agency refocused the 8(a) program emphasis on those firms that have never received an 8(a) contract. SBA executed a memorandum of understanding with the U.S. Department of Defense (DoD) to increase DoD contracts with such firms, and it is negotiating similar agreements with other federal

agencies. SBA also issued a new regulation to eliminate the distinction between local and national buys. This change will allow more 8(a) firms that are located outside of the Washington, D.C. to self-market in the capital area.

SBA has effectively addressed many concerns raised in the past about the effectiveness of the 8(a) program. For example, in 1995, SBA cut the average processing time for initial applications to 90 days from an average of 208 days the last three years. SBA has increased the number of annual portfolio reviews of 8(a) firms. In Fiscal Year 1994, 57% of all 8(a) firms were reviewed by SBA. In Fiscal Year 1995, the figure was 84%. It is expected that all firms will have been reviewed by the end of the current fiscal year. Finally, SBA has drastically increased the number of terminations of ineligible firms. Since Fiscal Year 1993, SBA removed 449 ineligible firms from the Program, more than it had processed in all prior years cumulatively.

The fact that the 8(a) program has enjoyed bipartisan support from President Nixon to President Clinton is testament to the recognition of the value and success of this program to meet its legislative objectives. I am opposed to H.R. 3994 because it simply ignores the need for the 8(a) program and does not make a real attempt to respond to questions about the operation of the program. If we need to reform the 8(a) program, let us do so. But, let us proceed deliberately and seriously. The adverse effects on minorities and women are too far-reaching to proceed so hastily under H.R. 3994. Elimination of the program is unacceptable.

Thank you.

September 16, 1996

Congresswoman Nydia Velazquez
United States Congress
House Committee Member on Small Business

Re: Article written by freelance writer, Joel Mowbray, dated September 12, 1996, Washington Times

The Honorable Nydia Velazquez:

We at DIGICON Corporation read the above captioned article (copy enclosed) and are concerned with the false impression an uninformed reader may have with the contents of this article. First, Mr. Mowbray admits he is using only one source for gathering his facts regarding DIGICON, and the source is an "anonymous" employee of DIGICON. It is of concern to us that he would not merely pick up the telephone to verify his erroneous facts.

It is true that DIGICON started its business ten years ago, however, its success has not been totally dependent upon "luck of their CEO being born in the right country," and DIGICON's ability to "wiggle into the 8(a)" program under the Small Business Administration. It is true the 8(a) program was established to enable certain qualified minority disadvantaged companies to be in a position to be awarded contracts that they would not probably be awarded without their 8(a) status. However, the actual award by the customer would not happen but for the fact the company must in fact be technically qualified to perform the specific project.

Thus, DIGICON's success has been due to its technical competency to perform the task required in a specific contract; its ability to perform on each of its contracts; the government agencies have been satisfied with DIGICON's performance; and the government agencies are desirous to use DIGICON again due to its past performance. The personnel of DIGICON have worked hard to achieve their respective success by being recognized as one of the finest system solution information companies in the United States. This success has not been dependent on the 8(a) program, but the hard work of over 500 employees of the company.

Second, the article lacks factual content, and is an apparent attempt to libel DIGICON, as follows:

1. DIGICON revenue for the fiscal year ended 1996 is approximately one half of the 100 million dollar

figure stated in the article.

2. The $97.3 million contract stated in the article was not a "graduation gift," as indicated in the article. DIGICON was negotiating this contract for more than one year before the actual award date. Further, 12 other companies were awarded the same contract, thus it was not specifically targeted to DIGICON.

   The other 12 companies are:

DIEZ (DMSI)	ISS (SEI)
FC Business	Signal
GMR	Software Surgery
GMSI	Soza
Haynes	Sumaria
IDP	UTI

   Furthermore, the contract is not an award of $97.3 million, but represents the ceiling of an Indefinite Delivery/Indefinite Quantity (IDIQ), contract. There is no guarantee of even a single dollar being realized by this contract. Each of the 13 awarded 8(a) companies must market this contract within government agencies and convince agencies to award tasks for the companies to perform. If the companies do not market effectively, they will not realize a single dollar of revenue from this contract. This form of IDIQ contract is rapidly gaining favor among Government agencies as part of procurement reform, and many contracts of this type have been issued in the past year to other non 8(a) Government contracting companies.

3. Stating the fact that sole source contracts are overpriced is an outrageously inaccurate comment. More than 40 billion dollars of government contracts a year are sole sourced. Sole source contracts are awarded for specific reasons, and before a sole source contract is awarded, the government agency must satisfy strict regulations to satisfy the rules.

4. Substantial amount of DIGICON's revenue is based upon competitive bid contracts, therefore, the 8(a)program did in fact prepare DIGICON to compete in the free market.

5. Not one contract awarded to DIGICON was a result of being "politically well-connected," but were a result of DIGICON being technically competent.

Third, while all government programs should be reviewed, the 8(a) program has been successful for preparing many companies to compete in the free market. Twenty-five years ago when the 8(a) program was initiated, there were few minority owned companies. The companies that did exist were in the low tech industries, such as security firms, maintenance firms, and garbage collection firms. Through the 8(a) program, companies like DIGICON were able to emerge in the high tech industry, and most important, were prepared to compete with non 8(a) companies. We believe DIGICON is what is right about the program, and so do many of our peers. DIGICON has received many awards from Inc. Magazine as well as being in the High Tech Fast 50 in the Washington area for the last 4 years. Further, DIGICON has achieved the Carnegie Mellon Software Engineering Institute SEI Level II certification for excellence in software development, such level has been achieved by less than 15% of all software companies in the world.

We at DIGICON understand that our admission to the 8(a) program was an opportunity not a guarantee. Of the 5500 firms in the program, only about half receive contracts each year. This is hardly a "give away". As in the commercial sector, the 80/20 rule is in effect. 80% of the revenue goes to 20% of the firms. Again, this percentage mirrors the real world, where only the committed, capable and industrious firms are rewarded with success. We do not apologize for our success. It was hard won. But as we look behind us to those disadvantaged firms who would like a similar chance at success, we urge the Congress and the American people to see the equity and fairness in providing a "a leg up" not a "hand out".

Respectfully submitted,

John J. Wu
President

8(a) Program Hearing Before
Business Committee

September 18, 1996

My name is Tapan Banerjee and I am the President of TapanAm Associates, Inc. I have over 25 years experience as a licensed professional engineer. I appreciate the opportunity to testify before the Small Business Committee today on behalf of TapanAm Associates, Inc. and express my strong support for the SBA 8(a) program.

TapanAm is a 13.5 year old design firm. The firm offered Structural and Civil Engineering services for 6 years before joining the 8(a) program in 1989. Since then the firm has grown to provide multi-discipline Architectural/Engineering services. Before 8(a) the staff numbered 6. Presently, we have 32 in-house personnel.

For anyone who is involved in altering or terminating the 8(a) program, it is important to understand the basic premise that, still today there is not an equal playing field. There have been many improvements, as there still must be, but it is simply not reality to think that every minority entrepreneur has the same opportunities to succeed in the business world as their non-minority counterparts.

Federal agencies select Arch./Eng. firms following the Brooks Bill, which stipulates that the selection be based on Qualification (QBS). It's the age old dilemma - **"without the Federal project experience, how can we build our qualification portfolio to compete for the federal contract?"** The 'good-old-boy' network still exists and the minority-owned business (considered as outsiders), are not always allowed to ride the opportunity train.

TapanAm was fortunate to receive considerable exposure and experience on Federal Arch/Eng. design projects working as consultant to large firms who had to meet a contractual goal of up to 5% for SDB firms. This transition into Federal design projects and the six years prior business experience helped us to take the full advantage of the 8(a)

business development program. Since late 1989 we have successfully provided design services to Federal agencies as the Prime consultant. We have since received several commendations for the quality of our work and have received various awards from the SBA.

8(a) is essentially an opportunistic program for business development. The following will help to clarify some misconceptions about the program:

- 8(a) program is not a "HAND OUT" to minorities. - The program only introduces the firms to the Federal agencies. Like any other business scenario, we had to directly market our services and convince the agencies that we were capable of doing a good job.
- 8(a) is based on competitive Brooks Bill selection process. - Federal agencies evaluate qualifications of at least 3 firms before a final selection is made. *Example: TapanAm had to compete with nearly 50 other firms to win one of the 2 contracts awarded to 8(a) firms on a nationwide competition.*
- 8(a) program does not help minority firms to receive repeat contracts. - Agencies' project managers **do not** call back firms because they are in the 8(a) program. It is up to the 8((a) firms to win repeat business with quality and efficient professional service.

The 8(a) program has given us the opportunity to stabilize our design business and helped develop a track record as Prime Design Consultant to clients. Presently, 65% of our contracts are non 8(a). We have 2 years left in the program. Like any other business, we feel we have earned recognition with our federal agency clients and we are not afraid to compete for contracts in the open market place.

TapanAm has created jobs for 32 families. 40% of the employees are minorities; 20% are women and over 40% are non-minorities. Most of all, TapanAm has created jobs for all Americans. Thanks to the 8(a) program firms like TapanAm are gradually making their mark as good American Small Businesses throughout the country.

If you think financial management of minority business is easy, please think about this - **we had to wait for 10 years before a friendly bank could offer us a line of credit.**

In the current affirmative action debate some believe that the field has been so over-leveled that minorities now enjoy preferential treatment and non-minorities are now discriminated against. This point of view is somewhat understandable. A non-minority contractor sees a government job advertised that he would like to bid on, discovers that it is set-aside for 8(a) and feels shutout, and to top it off, the 8(a) concern often doesn't have to compete for it. Sounds like welfare to him. From the other prospective, that of the minority contractor, he feels shutout exactly like that, but 100% of the time ... without 8(a), that is. What is critically important is that these views be kept in perspective! Contract awards to minorities are approximately 2-5% of ALL FEDERAL PROCUREMENT. Therefore, non-minorities are only left out of an extremely small portion and no one in the affirmative action debate seems to want to talk about the other 95%. If with the 8(a) Program, minority owned businesses only receive 2-5% of the procurement, then apparently they will receive NONE without it!

I oppose H.R. 3994, The Entrepreneur Development Program Act of 1996, because it takes the drastic step of repealing this program which has proven to work! The bill offers managerial and other technical guidance to small businesses through a modified 7(j) program. However, this proposal would be of little value to the small business community. This assistance exists already and it is not what minority-owned firms want or need. They need contracts to get experience, develop federal agency clients, and create jobs all over the country.

In conclusion, when President Nixon created this program it was because of the disparity between minority and non-minority businesses among Federal contracts. SBA 8(a), quite simply, provided me with an opportunity to compete for federal contracts. To give back to the program, I have opened doors for fellow minority small business in my industry. I am afraid that the death of this program would be a step back on the road to equality this society is striving to achieve.

United States General Accounting Office

GAO

Testimony

Before the Committee on Small Business,
House of Representatives

For Release on Delivery
Expected at
10 a.m. EDT
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September 18, 1996

SMALL BUSINESS

Status of SBA's 8(a) Minority Business Development Program

Statement of Judy A. England-Joseph, Director,
Housing and Community Development Issues,
Resources, Community, and Economic
Development Division

GAO/T-RCED-96-259

Madam Chair and Members of the Committee:

We are pleased to be here today to discuss the Small Business Administration's (SBA) 8(a) minority business development program. This program provides federal contracts to small businesses that are owned and controlled by socially and economically disadvantaged individuals to help these firms develop into viable, competitive businesses. Firms in the program are eligible to receive financial, management, and technical assistance from SBA to aid their development.

Our reports and testimonies over the years have chronicled the difficulties that SBA has had in implementing many of the changes to the 8(a) program mandated by the Congress in the Business Opportunity Development Reform Act of 1988 and subsequent amendments.[1] Our testimony today focuses on SBA's progress in implementing several changes that are of special interest to the Committee and that are designed to make the 8(a) program an effective business development program. These are (1) requiring that 8(a) contracts with a large dollar value be awarded competitively, (2) distributing 8(a) contracts so that a larger number of firms receive them, (3) ensuring that firms rely less on 8(a) contracts--by increasing their business that does not come through the 8(a) program--as they move through the 9-year program period, and (4) "graduating" from the program firms that have demonstrated that they can survive without 8(a) contracts. As requested, we will also provide information on SBA's denials of firms seeking to enter the program, and discuss SBA's efforts to provide management and technical assistance to firms in the 8(a) program.

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[1]See Small Business: Problems in Restructuring SBA's Minority Business Development Program (GAO/RCED-92-68, Jan. 31, 1992); Small Business: Problems Continue With SBA's Minority Business Development Program (GAO/RCED-93-145, Sept. 17,1993); Small Business: SBA Cannot Assess the Success of Its Minority Business Development Program (GAO/T-RCED-94-278, July 27, 1994); and Small Business: Status of SBA's 8(a) Minority Business Development Program (GAO/T-RCED-95-122, Mar. 6, 1995; GAO/T-RCED-95-149, Apr. 4, 1995).

Our statement today is based primarily on information that we obtained from SBA through fiscal year 1995, the latest year for which complete data were available. Most of this data came directly from SBA's automated systems. We did not independently verify the accuracy of this data.

In summary: some progress has been made, but SBA has not yet achieved key changes mandated by the Congress. Specifically,

- While the dollar amount of 8(a) contracts awarded competitively during fiscal year 1995 increased over fiscal year 1994, the percentage of contract dollars awarded competitively remained at about 19 percent.

- The concentration of 8(a) program contract dollars in a relatively few firms that occurred in prior years continued in fiscal year 1995, with less than 1 percent of the firms receiving about 25 percent of all contract dollars. This concentration limits the developmental opportunities available to other disadvantaged firms.

- During fiscal year 1995, a larger percentage of the firms in their final program year achieved the required level of non-8(a) business than we reported in April 1995--58 percent compared with 37 percent.

- During fiscal year 1995, 3 firms (among some 6,000 firms in the program) were graduated from the program because SBA determined that the firms had met their development goals and were able to compete in the marketplace without further 8(a) assistance.

BACKGROUND

The 8(a) program, administered by SBA's Office of Minority Enterprise Development, is one of the federal government's primary vehicles for developing small businesses that are owned by minorities and other socially and economically disadvantaged individuals. Firms that enter the program are eligible to receive contracts that federal agencies designate as 8(a) contracts without competition from firms outside the program. During fiscal year 1995, 6,002 firms participated in the 8(a) program. SBA data show that during fiscal year 1995, 6,625 new contracts and 25,199 contract modifications, totaling about $5.82 billion were awarded to 8(a) firms.

To be eligible for the 8(a) program, a firm must be a small business that is at least 51-percent owned and controlled by one or more socially and economically disadvantaged persons. A business is small if it meets the SBA standard for size established for its particular industry. Members of certain ethnic groups, such as black and hispanic Americans, are presumed to be socially disadvantaged. To be economically disadvantaged as well, socially disadvantaged individuals cannot have personal net worth (excluding equity in a personal residence and ownership in the firms) exceeding $250,000. In addition, the firm must be an eligible business and possess a reasonable prospect for success in the private sector. Firms can participate in the 8(a) program for a maximum of 9 years.

The Business Opportunity Development Reform Act of 1988 marked the third major effort by the Congress to improve SBA's administration of the 8(a) program and to emphasize its business development aspects. The legislation affirmed that the measure of success for the 8(a) program would be the number of firms that leave the program without being unreasonably reliant on 8(a) contracts and that are able to compete on an equal basis in the mainstream of the American economy. Over the years, reports by GAO, SBA's Inspector General, and others have identified continuing problems with SBA's administration of the program and/or with the

program's ability to develop firms that could successfully compete in the marketplace after leaving the program.

PERCENTAGE OF COMPETITIVELY AWARDED 8(a) CONTRACT DOLLARS WAS ABOUT THE SAME

To help develop firms and better prepare them to compete in the commercial marketplace after they leave the program, the act requires that 8(a) program contracts be awarded competitively to 8(a) firms when the total contract price, including the estimated value of contract options, exceeds $5 million for manufacturing contracts or $3 million for all other contracts.

Of the approximately $3.13 billion in new 8(a) contracts awarded in fiscal year 1995, about $610 million, or 19.5 percent of the total dollar amount, was awarded competitively. In comparison, in fiscal year 1994, about $380 million, or 18.5 percent of the $2.06 billion in new 8(a) contracts, was awarded competitively. Between fiscal years 1991 and 1995, the total dollar value of new 8(a) contract awards increased by about 96 percent, while the value of contracts awarded competitively increased by about 190 percent. Appendix I shows the number and the dollar value of 8(a) contracts awarded competitively in fiscal years 1991 through 1995.

SBA's June 1995 revisions to the 8(a) program regulations closed a major loophole involving the competitive award of indefinite delivery, indefinite quantity (IDIQ) contracts. IDIQ contracts are used when an agency does not know the precise quantity of supplies or services to be provided under a contract. As the agency identifies a specific need for goods or services, it modifies the IDIQ contract to reflect the actual costs associated with providing that quantity of goods or services, up to the maximum amount specified in the contract.

Before the June 1995 revisions, SBA's 8(a) program regulations required that an agency, when determining whether an IDIQ contract should be offered on a competitive or noncompetitive (sole-source) basis, consider only the guaranteed minimum value of the contract rather than the estimated total contract amount. According to SBA, IDIQ contracts were often improperly used simply to avoid the need for competition, and wide differences often occurred between the guaranteed minimum values of IDIQ contracts and the amount eventually spent by agencies under the contracts. To avoid this problem, the June 1995 regulations require that for all 8(a) program contracts SBA accepts after August 7, 1995, including IDIQ contracts, the procuring agency must consider the total estimated value of the contract, including the value of contract options, when determining whether the contract should be awarded competitively.

CONTRACT DOLLARS CONTINUED TO BE CONCENTRATED IN A SMALL PERCENTAGE OF FIRMS

The concentration of 8(a) contract dollars among relatively few firms is a long-standing condition that continued in fiscal year 1995. SBA data show that in fiscal year 1995, 50 firms--less than 1 percent of the 6,002 total firms in the 8(a) program during the fiscal year--received about $1.46 billion, or about 25 percent of the $5.82 billion in total 8(a) contracts awarded. In fiscal year 1994, 50 firms--about 1 percent of the 5,155 firms then in the program--also received about 25 percent of the $4.37 billion in total 8(a) contract dollars awarded during the fiscal year. Twelve firms that were among the top 50 in fiscal year 1995 were also among the top 50 firms in the previous year. Furthermore, 22 firms that were among the top 50 in fiscal year 1994 were also among the top 50 firms in fiscal year 1993. Appendix II contains a table that shows the range of total contracts dollars awarded to the top 50 firms for fiscal years 1992 through 1995.

While 8(a) contract dollars continue to be concentrated in a relatively few firms, many economically disadvantaged firms do not receive any 8(a) program contracts. SBA data show that of the 6,002 firms in the program during fiscal year 1995, 3,267 firms, about 54 percent, did not receive any program contracts during the fiscal year. In comparison, in fiscal year 1994, 56 percent of the 8(a) firms did not receive any program contracts.

As we testified in April 1995[2], a key reason for the continuing concentration of contract dollars among a relatively few firms is the conflicting objectives confronting procuring officials, according to SBA officials. In SBA's view, the primary objective of procuring officials is to accomplish their agency's mission at a reasonable cost; for these officials, the 8(a) program's business development objectives are secondary. At the same time, the agency's procurement goals for the 8(a) program are stated in terms of the dollar value of contracts awarded. According to SBA, the easiest way for agencies to meet these goals is to award a few large contracts to a few firms, preferably firms with which the agencies have had experience and whose capabilities are known.

In addition, according to SBA the concentration of firms receiving 8(a) contracts is no different than the concentration among firms that occurs in the normal course of federal procurement. However, while this may be true for federal procurement overall, the Congress in amending the 8(a) program in 1988 sought to increase the number of competitive small businesses owned and controlled by socially and economically disadvantaged individuals through the fair and equitable distribution of federal contracting opportunities.

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[2]Small Business: Status of SBA's 8(a) Minority Business Development Program (GAO/T-RCED-95-149, Apr. 4, 1995).

In 1995, SBA made several efforts to increase the award of 8(a) contracts to firms that had never received contracts. SBA required its district offices to develop action plans to increase the number of 8(a) contract opportunities offered to a greater percentage of 8(a) firms. These action plans were to include specific initiatives for marketing the program to federal procurement offices in their jurisdictions. In addition, the Departments of Defense and Veterans Affairs agreed to give special emphasis to 8(a) firms that had never received contracts. Although SBA has not assessed the impact of these activities on increasing contract awards, SBA officials believe that these steps have helped in getting 8(a) contracts to firms that had never received them.

At the same time, in the view of SBA officials, the fact that some firms do not receive any 8(a) contracts may not be a problem because not all firms enter the program to receive 8(a) contracts. Rather, some firms, according to SBA officials, seek 8(a) certification in order to qualify as disadvantaged firms for other federal programs, such as the highway construction program funded by the Department of Transportation, or state and city programs that set aside contracts for disadvantaged firms.

LARGER PERCENTAGE OF FIRMS MET TARGET LEVELS OF NON-8(a) BUSINESS

To increase the program's emphasis on business development and the viability of firms leaving the program, the act directed SBA to establish target levels of non-8(a) business for firms during their last 5 years in the program. The non-8(a) target levels increase during each of the 5 years, from a minimum of 15 percent of a firm's total contract dollars during its fifth year to a minimum of 55 percent in the firm's ninth or final program year. SBA field offices, as part of their annual reviews of firms, are responsible for determining whether firms achieve these target levels.

In April 1995, we testified that SBA data showed that while 72 percent of the firms in their fifth year that had 8(a) sales met or exceeded the minimum 15-percent non-8(a) target established for the fifth year, only 37 percent of the firms in their ninth or final program year that had 8(a) sales met or exceeded the minimum 55-percent target established for that year. The data also showed that of the 1,038 firms in the fifth through the ninth year of their program term that 8(a) sales, 37 percent did not meet the minimum targets.

SBA data for fiscal year 1995 showed that of the 8(a) firms in their fifth year that had 8(a) sales during the fiscal year, about 85 percent met or exceeded the minimum non-8(a) business target of 15 percent established for that year. In comparison, of the 8(a) firms in their ninth or final program year that had 8(a) sales during the fiscal year, 58 percent met or exceeded the minimum non-8(a) business target of 55 percent established for that year. Appendix III ahows the extent to which firms met their target levels for fiscal year 1995.

In a September 1995 report, SBA's Inspector General (IG) discussed SBA's problems in enforcing the business-mix requirements. According to the IG, over one-third of the 8(a) firms in the last 5 years of their program term did not meet the business-mix requirements, yet they accounted for about $1.4 billion (63 percent) of total 8(a) contract revenues of all firms subject to the requirements. The IG noted that SBA's regulations identify a range of remedial actions that the agency can take to improve firms' compliance with the requirements, including reducing or eliminating sole-source 8(a) contract awards, and that SBA personnel have the discretion of selecting which remedial actions to impose. The IG found, however, that SBA personnel often took minimal or no action when firms did not meet the requirements, and firms continued to obtain 8(a) contracts even though they were not complying with the regulations to develop non-8(a) business.

To address this problem, the IG recommended that SBA limit the dollar value of new 8(a) contracts awarded to firms that do not meet their non-8(a) business target levels. SBA concurred with this recommendation and in March 1996 stated that it was exploring two options--eliminating all new 8(a) contracts to firms that do not meet their non-8(a) business levels, or placing a limit on the dollar value of 8(a) contracts awarded to such firms. In September 1996, an SBA official told us that the agency could not propose regulations implementing such restrictions until the Department of Justice finalizes its regulations regarding federal affirmative action programs.

The IG's September 1995 report also concluded that SBA could not measure the success of the 8(a) program as defined by the Congress, namely the number of firms that leave the program without being unreasonably reliant[3] on 8(a) contracts and that are able to compete on an equal basis in the mainstream of the American economy. The IG reported that SBA's procedures did not provide for compiling and reporting data on the (1) number of companies that met their business-mix requirements while in the program and (2) companies that remained in business after they no longer had 8(a) revenues. As a result, the IG concluded that neither SBA nor the Congress could determine whether the 8(a) program was accomplishing its intended purpose or whether any changes to the program were needed.

To address these problems, the IG recommended that SBA annually compile data on the numbers of firms that leave the 8(a) program that are unreasonably reliant on 8(a) contracts and those that are not. The IG also recommended that SBA (1) track former 8(a) firms after they have completed all 8(a) contracts to determine whether they are still in business and (2) annually determine how many of the firms that are still in business were unreasonably reliant on 8(a) contracts when they left the

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[3]SBA has interpreted the language "not unreasonably reliant" to mean 8(a) firms that have met the appropriate non-8(a) business target.

program. With regard to this recommendation, the IG noted that responses to a questionnaire it sent to former 8(a) firms that had been out of the program for approximately 1.5 to 5.5 years showed that many firms still had substantial revenues from carryover 8(a)contracts. For example, 23 percent of the respondents reported that more than 50 percent of their total revenues were from 8(a) contracts.

In March 1996, SBA stated that it would begin to annually compile data on the number of firms leaving the 8(a) program that met or did not meet the business-mix requirements and, as a result, were or were not unreasonably reliant on 8(a) program contracts. SBA also stated that it was currently tracking 8(a) graduates to determine their current status and levels of revenues. Finally, SBA announced that it was developing a more thorough survey to track graduates and was considering using external data sources, such as Dun and Bradstreet, for this information. As of September 1996, SBA had not developed this survey. According to an SBA official, work on this project has been delayed by several factors, including the furloughs of SBA staff and the turnover of a top SBA official.

FEW FIRMS GRADUATE FROM PROGRAM

SBA's regulations provide that any firm that (1) substantially achieves its business development goals and objectives before completing its program term and (2) has demonstrated the ability to compete in the marketplace without 8(a) program assistance may be graduated from the 8(a) program. According to the regulations, factors SBA is to consider in deciding whether to graduate a firm include the firm's sales, net worth, working capital, overall profitability, access to credit and capital, and management capacity and capability. SBA may also consider whether the firm's business and financial profile compares positively with the profiles of non-8(a) firms in the same area or a similar line of business. A determination of whether a firm should be graduated is a part of SBA's annual review of each firm. A firm has the

option to appeal SBA's determination that it graduate from the 8(a) program. After graduating, a firm is no longer eligible to receive 8(a) contracts.

According to SBA data, during fiscal year 1995, SBA graduated three firms from the program--the first graduations in the program's history, according to SBA officials. The data also show that during fiscal year 1995, SBA terminated another 160 firms from the program for various reasons, including failure to comply with program requirements, and 250 more firms left the program because their program terms had expired during the fiscal year. According to SBA officials, SBA usually does not require that a firm graduate because of anticipated appeals and the difficulty in enforcing the graduation requirement, especially if the firm disagrees with SBA's decision.

SBA's IG has identified companies that should have been, but were not, graduated from the 8(a) program. For example, the IG reported in September 1994 that its examination of 50 of the larger 8(a) firms found that most of these firms were larger and more profitable than firms not in the program. Specifically, the IG's review showed that 32 of the 50 8(a) firms exceeded their respective industries' averages for the following five performance factors: business assets, revenues, gross profits, working capital, and net worth. The IG concluded that allowing such firms to continue in the program deprived other truly economically disadvantaged firms of 8(a) assistance and understated the 8(a) program's overall success because firms that had demonstrated success were not graduated.

In May 1995, as a result of the IG's review, SBA established requirements for its field staff to (1) compare annually five financial performance factors of 8(a) firms with the industry averages for companies in the same line of business and (2) consider graduation from the program for any 8(a) firm that meets or exceeds three of averages. However, a February 1996 evaluation by SBA of annual reviews conducted by SBA field staff of 8(a) firms raises questions about the ability of the field staff to

conduct such analysis. SBA noted that the staff's financial analysis is very poor, staff members do not fully understand the concepts of economic disadvantage, financial condition of the firm, and access to capital, and the annual reviews contained few comparisons of the condition of 8(a) firms with similar businesses. To address this problem, SBA recommended that field staff receive training in financial analysis and guidance on the concept of continuing economic disadvantage. As of September 1996, SBA planned to provide this training during a national meeting planned for October or November 1996.

APPLICATIONS PROCESSED AND MANAGEMENT AND TECHNICAL ASSISTANCE PROVIDED IN FISCAL YEAR 1995

I would now like to provide some overall statistics regarding SBA's disposition of applications made to the 8(a) program during fiscal year 1995, and the amount of management and technical assistance provided during the year.

Applications Processed

SBA data show that during fiscal year 1995, SBA processed 1,306 8(a) program applications. SBA approved 696 of the applications and initially denied the remaining 610. Among the reasons cited for denying the 610 applications were the following:

- The firm lacked potential for success (367 applications).

- The socially and economically disadvantaged individual did not own or control the firm (364 applications).

- The individual who owned and controlled the firm was not socially or economically disadvantaged (263 applications).

- The firm was a type of business that is not eligible to participate in the program (78 applications).

Of the 610 applications that SBA initially denied, 323 were reconsidered and 189 were subsequently approved, bringing to 885 the total number of applications approved during fiscal year 1995. In comparison, SBA ultimately approved 1,107 of the 1,536 applications it processed in fiscal year 1994, and 540 of the 819 applications it processed in fiscal year 1993.

Management and Technical Assistance

As small businesses, 8(a) firms are eligible to receive management and technical assistance from various sources to aid their development. SBA's primary source of such assistance has been its 7(j) program. Authorized by section 7(j) of the Small Business Act, as amended, the 7(j) program provides seminars and individual assistance to 8(a) firms. The 8(a) firms are also eligible to receive assistance from SBA's Executive Education Program, which is designed to provide the owners/managers of 8(a) firms with executive development training at a university. SBA may also provide 7(j) assistance to socially and economically disadvantaged individuals whose firms are not in the 8(a) program, firms located in areas of high unemployment, and firms owned by low-income individuals.

In fiscal year 1995, SBA spent about $7.6 million for 7(j) assistance to 4,604 individuals. This figure included individuals from 1,785 8(a) firms that received an aggregate of 9,452 days of assistance, and 190 firms that received executive training under SBA's Executive Education Program.

In fiscal year 1996, SBA changed the focus of the 7(j) program to provide only executive-level training. The individual assistance and seminar training previously provided will be provided by SBA's Small Business Development Centers and Service Corps of Retired Executives.

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This concludes my prepared statement. I would be glad to respond to any questions that you or the Members of the Committee may have.

APPENDIX I

8(a) CONTRACTS AND DOLLARS AWARDED COMPETITIVELY FOR FISCAL YEARS 1991 THROUGH 1995

(Dollars in billions)

8(a) contracts—dollars and percent	Fiscal year 1991	Fiscal year 1992	Fiscal year 1993	Fiscal year 1994	Fiscal year 1995
Number of new contacts awarded	4,576	4,693	5,481	5,990	6,625
Number of new contracts awarded competitively	86	139	202	174	283
Percent of new contracts awarded competitively	1.88	2.96	3.69	2.89	4.27
Dollar amount of new contracts awarded	$1.60	$1.70	$2.21	$2.06	$3.13
Dollar amount of new contracts awarded competitively	$0.21	$0.34	$0.34	$0.38	$0.61
Percent of new contract dollars awarded competitively	13.13	20.00	15.38	18.45	19.49

Source: SBA.

RANGE OF TOTAL 8(a) CONTRACT DOLLARS AWARDED TO TOP 50 8(A) FIRMS FOR FISCAL YEARS 1992 THROUGH 1995

(dollars in millions)

8(a) contracts—dollars and percent	Fiscal year 1992	Fiscal year 1993	Fiscal year 1994	Fiscal year 1995
Total 8(a) contract dollars awarded to top 8(a) firm	$91.6	$71.2	$57.2	$97.1
Total 8(a) contract dollars awarded to fiftieth 8(a) firm	$13.2	$14.2	$12.0	$16.9
Total 8(a) contract dollars awarded during fiscal year	$4,167.9	$4,333.4	$4,370.0	$5,820.7
Total 8(a) contract dollars awarded to top 50 firms	$1,227.7	$1,075.1	$1,083.0	$1,461.4
Percent of total 8(a) contract dollars awarded to top 50 firms	29.5	24.8	24.8	25.1

Source: SBA.

ANALYSIS OF 8(A) FIRMS' COMPLIANCE WITH THEIR NON-8 (a) BUSINESS REQUIREMENTS FOR FISCAL YEAR 1995

Program year	Required level of non-8(a) business (percent of total revenues)	Total number of firms with 8(a) sales	Number of firms with 8(a) sales that met or exceeded levels	Percent of firms with 8(a) sales that met or exceeded levels	Number of firms with 8(a) sales that did not meet levels	Percent of firms with 8(a) sales that did not meet levels
5	15-25	266	227	85	39	15
6	25-35	319	239	75	80	25
7	35-45	189	140	74	49	26
8	45-55	148	87	59	61	41
9	55-75	198	114	58	84	42
Total		1,120	807	72	313	28

Source: SBA

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Testimony by Steven Farinha, President of Farinha Inc.
before the House Small Business Committee
Hearing on H.R.3994
September 18, 1996

Thank you Chairwoman Meyers and members of the Small Business Committee for the opportunity to submit testimony today on the Small Business Administration's 8a program. My name is Steven Farinha. I am the President of Farinha Inc. d.b.a. Paragon Construction located in Auburn Ca. and I have always been a registered Republican.

Today I would like to testify about my company and the significant contributions that the SBA 8a program has made to our success. I believe my company is a model example of what the 8a program was intended to promote.

Let me give you a little background about myself. I was raised in a community of farming and agriculture. So, I learned at a very young age that if I wanted something, I needed to work. While in school I fell in love with the building industry, and decided that when I grew up that's what I wanted to do.

In 1983 I founded Paragon Construction, with a pick up truck, a dog and $500.00. I had a dream that I wanted to construct buildings. Then came a eye opener, in the construction industry it takes capital and surety credit to operate a commercial construction company, and without those two key ingredients you can not succeed. Every time in my life that I have encountered an obstacle, I

somehow have attempted to make something positive out of the situation. So, I went to my parents and told them that I needed some assistance. They mortgaged there house to help me out, but this in itself was not enough for the bonding companies. So my bonding line was very small and with it I was not able to build the company due to lack of capital and surety credit. We had a annual volume of contracting business of about 400,000.00.

Then in 1988 I approached SBA for assistance and learned about the 8a program. I was certified in May of 1989 and received my first contract in 1991. It took us two years to get our first contract and from then until now we have grown to a staff of 100 employees with three offices. Our current volume is approximately 17 million dollars.

People always want to know what our business mix is of 8a versus non 8a contracts. Well, I am happy to say that our 8a sales our approx. 35% and our non 8a sales account for the other 65% of our volume. Some of our current customers are the Air Force, Navy, Army, Coast Guard, General Services Administration, Veterans Administrations, Social Security Administration, and National Guard. We have received numerous letters of commendation from our customers. We believe that if some one will give us one opportunity to let us demonstrate that we perform a quality project for a fair and reasonable price, we can keep that customer and develop a long lasting relationship. We have won

numerous awards in the past few years as well. One was being recognized as a MBDA Regional minority contractor of the year. Also we are active in our local community participating in events such as Career day for kids, and with local civic groups.

I cannot stress enough how essential the 8(a) program has been for my success. The 8(a) program plus hard work always equals success. One of the key aspects of the 8(a) program is that it provides diversity within government contracting which in turn maximizes competition and ultimately provides the government with higher quality goods and services at competitive prices.

H.R. 3994 kills the 8(a) program. This bill does not attempt to reform the 8(a) program. It simply repeals SBA's contracting authority. The 8(a) program enables socially and economically disadvantaged persons to compete for federal contracts. Absent real contracts for minority firms to enter the market and perform, participation in development assistance programs becomes merely an academic exercise benefitting neither the small businesses nor the federal government.

H.R. 3994 provides no substitute for the 8(a) program. The bill offers managerial and other technical guidance to small business, already provided by SBA. H.R. 3994 provides no comprehensive substitute for the most important component of the 8(a) program, the opportunity to compete for a contract.

This program is a foot up not a hand out for small businesses. 8(a) is a business development program designed to help small firms become self-sufficient and competitively viable. In order to become an 8(a) firm, businesses must demonstrate a potential for success and that's why 8(a) has been a time worn success. It creates jobs and promotes economic growth. Thank you

TESTIMONY OF:

BRENDA B. FORD

BEFORE

The House Committee On Small Business

September 18, 1996

My name is Brenda Ford. I am president and owner of a small firm known as Ford & Associates. My firm specializes in interiorscaping.

I have been in business for fifteen years and would like to say that I used to believe the myth that the Small Business Administration was there to help all small business owners with contract financing, obtaining contracts, 8(a) certification as well as setting up a workable business plan. I was wrong!

Ninety-eight percent of the services I stated have not happened for my firm in the fifteen years that I have been in business.

I am here today to testify about just how unfair, mismanaged, unethical and corrupt the SBA is towards African-American business owners. You know, the type of stories which are usually swept under the rug and ignored by directors or appointed secretaries of these agencies.

I will tell you, first of all, how my firm was denied fair and equal contracting opportunity to become 8(a) certified fifteen years ago and, as strange as it may seem, how the same SBA representative most recently denied my firm contract awards on a government project - regardless of the fact that my firm has a proven track record in work performance and that my bid was $200 less than the other business owner.

I will tell you a story of just how unfair the SBA is and how they ignored violations of

federal laws and regulations Public Law 95-507 is not enforced at all I will tell you the story of the cozy relationship between the SBA representatives, the contracting officers and the facility service managers Most managers that I have come in contract with give me the impression they are above the law After all, management has nothing to fear from wrong doings.

I have documented cases of wrong doing by SBA representatives, facility services managers and contracting officers and for fifteen years the outcome has been the same. The contract was always awarded to larger firms Even after such matters were brought to the attention of department directors and appointed secretaries, these matters were ignored by whomever the correspondence was forwarded to and nothing was resolved. In many cases, even the Freedom of Information request, which would give written documentation of biased treatment of African-American firms, has been prolonged or denied.

I do not see the Small Business Administration as being a friend to the African-American community of businessmen and women. Those who have received any type of real assistance is few and far in between. I cannot see an agency being in existence if they are not productive, or if they are not doing their jobs to truly help small, socially-disadvantaged and African-American business owners. If this were private industry, would this be allowed? Because of SBA's mismanagement of case after case that I brought to their attention, I was not able to resolve anything.

I haven been forced to request letters for the right to sue for financial harm done to may firm. Even my Congressman's office was given the runaround by federal agencies.

I wish to recommend that this Committee seriously consider setting up a task force of private business owners, county by county, and giving that task force the authority to:

- Bring concerns of socially-disadvantaged business owners to the Committee with recommendations of how federal funds should be spent with federal agencies, as well investigate problems brought to their attention by small business owners.

- Expedite requested information under the Freedom of Information Act when there are signs that the small firm is facing financial hardship as a result of actions taken by the federal agency against the small business owner.

I also recommend that:

- Federal management involved in biased treatment or denial of fair and equal contracting opportunities be placed on leave without pay until the matter is resolved.

- Federal funds to nonprofit groups and private firms who receive federal money be suspended if it is discovered that unethical, deliberate misconduct and denial of fair and equal contracting opportunities have occurred and management refuses to correct the situation or resolve the problem in a timely manner.

If the African-American business community is to survive and provide employment for those within our community, we need to work with individuals of character who are committed to the well being of all minority small business owners. That character and commitment has not existed within the SBA for a long time. Instead we have been given directors who can talk the talk but have little intention of walking the walk! Their track record speaks for itself. Smoke and mirrors just won't do the trick this time. As I overheard one federal employee say to another: "Promise them anything, but given them nothing!" And that is what the SBA has been doing for years.

Madam chairman, I keep hearing the terms racism and discrimination. Isn't that against

the law? I wonder why those managers who are racist and discriminators are not dismissed from the federal government? After all, wouldn't that resolve a large part of the problem of fair and equal contract opportunities?

Ladies and gentlemen, I thank you all for allowing me to speak before you regarding some of the problems faced by African-American business owners today.

That concludes my testimony

Testimony

by

George R. La Noue

Professor of Political Science -UMBC

Director, Policy Sciences Graduate Program

Director, Project on Civil Rights and Public Contracts

University of Maryland Graduate School, Baltimore

Hearings

Committee on Small Busines

U. S. House of Representatives

104th Congress

September 18, 1996

The Concept of Presumptive Eligibility in the 8(a) Program

After *Croson* and *Adarand*

I. Introduction

My name is George R. La Noue. I am the Director of the Policy Sciences Graduate Program and the Director of the Project on Civil Rights and Public Contracts of the University of Maryland Graduate School, Baltimore (UMBC). The Project is the largest publicly accessible database of materials on minority business enterprise (MBE) programs in the country, encompassing more than 50,000 pages of published and unpublished court cases, disparity studies, and research articles.

I have served as trial expert for plaintiffs in challenges to racial preferences in contracting programs in Columbus, Ohio, *AGC v Columbus*, 1996 WL 492336 (S. D. Ohio) and Philadelphia, Pennsylvania (*Contractors Association of Eastern Pennsylvania v. City of Philadelphia*, 893 F. Supp. 419 (E. D. Pa.1995) and 1996 WL 426804 (3rd Circuit Pa.) These cases, the first in this area of the law to be decided after full discovery and trial, resulted in the striking down of the MBE program by federal courts on the grounds that the factual predicates underlying the programs were incomplete and flawed. Currently, I am serving as expert witness for the plaintiffs in the case *McCrossan v. Cook* in New Mexico, which is a challenge to a contract set-aside by the Department of Defense. In addition, I have served as a consultant to the state of Texas, the city of Albuquerque, a consortium of governments in Oregon and currently with the city of West Palm Beach in Florida and a consortium of governments in the Nashville, Tennessee area in connection with the development of their disparity studies and MBE programs. In short, I have worked with both governments and

plaintiffs in the attempt to find a constitutional path in the complex area of minority business programs.

II. The concept of presumptive eligibility

What I want to discuss with you today is the concept of determining social disadvantage in the 8(a) program by granting that presumption to members of certain racial and ethnic groups. There are many other issues in the 8(a) program, including bureaucratic mismanagement, the failure to graduate firms, and the concentration of benefits on a small number of participants. But I assume these issues are familiar to you or will be discussed by others. I want to focus on the presumptive eligibility issue which is the most constitutionally suspect part of the program and the issue on which I have done research.

Presumptive eligibility is the concept around which participation in the 8(a) program is built. While there is a requirement of economic disadvantage as well, the rules are exceedingly permissive. In construction, for example, the firm size limitations make 98% of the construction businesses in the country eligible. Businesses with annual revenues of $100,000,000 are in the 8(a) program. Similarly, the personal income limitations of $250,000 (not counting the worth of the owner's residence or business) and $750,000 once you are in the program mean that everyone but the wealthy are eligible. Therefore the real screen in the 8(a) program is not economic disadvantage, but social disadvantage. For that screen, presumptive eligibility is the key.

Presumptive eligibility involves a very large presumption indeed. Put simply, it assumes that American business owners can be classified into two groups on the basis of

their race and ethnicity by the federal government. Owners in the first group are presumed to be socially disadvantaged and entitled to benefits. Owners in the second group are presumed to be socially advantaged and excluded from these benefits. In practice, presumptive eligibility for the 8(a) program means that two business owners with identical economic status, who have gone to the same schools, live in the same communities, and have the same business histories would be treated by the SBA very differently.

For the business owner who is in a presumptively eligible group and meets the economic criteria, admission to the 8(a) program and its access to billions of dollars of contracts annually will be a major competitive advantage. For the business owner in the non-presumptively eligible groups, admission to the 8(a) program requires proving by clear and convincing evidence that he or she has suffered "chronic racial or ethnic prejudice or cultural bias." This is a major barrier guarded by a very unsympathetic SBA bureaucracy. Of the 5,628 8(a) firms in fy 1994, only one-half of one percent of the owners are not in the presumptively eligible groups (9 women, 9 disabled, and 8 white males)(source: SBA answer to interrogatory in *McCrossan v. Cook*). Even, in the case of the O'Donnell Construction company which proved to the Court of Appeals for the District of Columbia that as a white male-owned company it had been discriminated against by the district's MBE program, (*O'Donnell v. District of Columbia*, 963 F.2d 420, D.C. D.C. 1992, now Justice Ginsburg concurring), the SBA refused to concede the firm had suffered from racial prejudice. O'Donnell finally received 8(a) status when an administrative law judge overturned the SBA administrators.

III. Presumptively Eligible Groups

Which are the presumptively eligible groups? Any person who can show ancestry or identify with the following groups is presumptively eligible under 8(a) rules: Black American, Hispanic American, Native American (American Indian, Eskimo, Aleut or Native Hawaiian, Asian Pacific American (An Individual with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, The Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, or Nauru, Subcontinent Asian American (An individual with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal).

While a history of discrimination against some of these groups is well known, the SBA list is certainly not the exhaustive list of groups which have suffered discrimination in the United States or have other forms of social disadvantage. Many of the groups on the SBA list are relatively recent arrivals to the United States and there is little, if any, evidence of any systematic bias directed against them. Nevertheless, a business owner who can claim membership in any of these groups is legally considered socially disadvantaged.

IV. Historical Origins of Presumptive Eligibility

It is not certain the SBA actually now knows or can reconstruct how some of the groups on its presumptively eligible list actually got there. In a deposition for the *McCrossan* case, the SBA official who the government identified as knowledgeable about the origins of

presumptive eligibility conceded it would be sheer speculation about the criteria used in the past by his agency.

SBA was created in 1953 to "aid, counsel, assist, and protect, insofar as is possible, the interest of small-business concerns in order to preserve free competitive enterprise."(15 U.S.C. 631(a) (1971)) The agency entered into procurement contracts with other federal agencies and then subcontracted with small businesses which supplied the services or materials. For the first fifteen years of its existence, the SBA focused on assisting all small businesses, regardless of the race or ethnicity of the owner.

SBA policy changed after the 1967 publication of the Kerner Commission Report examining the urban riots of the preceding year.(U.S. Code Congressional and Administrative News, 3843) The Commission concluded that "special encouragement" was needed to guide blacks into the economic mainstream. Consequently, the agency decided administratively to construe its Section 8(a) authority to establish set-asides for small businesses owned by "socially or economically disadvantaged" individuals.

For the first few years, this term remained undefined, but in 1973 SBA published in the *Federal Register* a list of five groups "presumed" to be socially or economically disadvantaged: "blacks, American Indians, Spanish-Americans, Asian-Americans, and Puerto Ricans." (13 C.F.R. 124.8-(c) (1973)) There were no hearings or formal findings and the announcement did not explain why SBA had gone beyond the "special encouragement" of blacks recommended by the Kerner Commission to grant affirmative action status to other groups. Nor was there any explanation as to why these particular groups had been included.

The following year, 1978, Congress passed P.L. 95-507, the Small Business Investment Act, providing a statutory basis to what had been for a decade a purely administratively-based 8(a) program and generating a three track system for participation in set-asides. In the first track were small businesses owned by groups (blacks, Hispanics, and Native Americans) considered presumptively "socially and economically disadvantaged." P.L. 95-507 defined socially disadvantaged individuals "as those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." "Economically disadvantaged individuals" were "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired ... as compared to others in the same business area who are not socially disadvantaged." Presumptive eligibility has meant in practice that an owner merely had to prove group membership and that the program's economic standards were met. In the middle track were businesses owned by members of groups who could petition SBA for presumptive eligibility. In the third track, individual owners were required to qualify on their own according to far more extensive and rigorous requirements than those for group eligibility.

Groups petitioning for 8(a) minority status were evaluated by SBA on several measures. Petitioners had to make an "adequate showing" that the group had suffered racial, ethnic, or cultural bias by demonstrating:

(1) The group has suffered the effects of prejudice, bias, or discriminatory practices;

(2) Such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in P. L. 95-507, and

(3) Such conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to all small business owners. (13 C.F.R. 124.105 (d) (2) (i-iii))

The motivation for a group seeking inclusion was readily apparent. Contract awards under 8(a) have totaled as much as $5.8 billion in the last fiscal year. Perhaps even more enticing was the fact that the 8(a) program became the most copied model for affirmative action programs around the country. SBA selection of a group influenced acceptance into other major federal affirmative action programs, hundreds of state and local programs, and even private sector programs, such as those voluntarily established by corporations and universities.

It was the clear Congressional intent that SBA not confine 8(a) benefits solely to the groups P.L. 95-507 had listed. The House Committee report accompanying the new law stated "[t]here is sufficient discretion . . . to allow SBA to designate any other additional minority group or persons it believes should be afforded the presumption of social and economic disadvantage." (H.R. Rep. No. 949, 95th Cong. 2d Sess. 1978) The final Conference Committee report specifically referred to a "poor Appalachian white person" as an example of cultural bias that might justify inclusion. (Legislative History, P.L. 95-507, p. 3882) Congress had neither the political will nor the information to draw clear-cut lines of inclusion/exclusion, so that task was delegated to the administrative agency.

SBA also understood the breadth of its mandate. After the legislation, it issued Policy and Procedural Release #2017 in 1980 which said:

MEANING OF SOCIALLY OR ECONOMICALLY DISADVANTAGED

Except to recommend the elimination of any suggestion that only members of minority groups are eligible for assistance under this program and to specify that the

program is to aid all who are hampered in achieving full citizenship in our economic system by virtue of their social or economic disadvantages, Congress has not fully defined the words "socially or economically disadvantaged." This lack of precise legislative definition suggests that a precise definition is inappropriate, and that flexibility is warranted.

In determining whether the owners of small business concerns are "disadvantaged," consideration may be given to the following:

(a) low income;

(b) unfavorable location such as urban ghettos or depressed rural areas and areas of high unemployment or under-employment;

(c) limited education;

(d) physical or other special handicap;

(e) inability to compete effectively in the marketplace because of prevailing or past restrictive practices; and

(f) Vietnam era service in the Armed Forces, (August 5, 1964 to May 7, 1975), or such other factors as contribute to a disadvantaged condition in the ordinary (dictionary) meaning of that word: lacking in basic resources or conditions necessary to achieve an equal position in society. (Revised May 1, 1980)

A test of SBA's authority came almost immediately. When P.L. 95-507 became law in 1978 the list of presumptively eligible minority groups did not include Asian-Americans. (Parren Mitchell, the principle policy-maker for MBE programs said the omission of Asian-Americans was "inadvertent." Native Americans were not included until added in the Conference Committee report.) Within a year, after an intense lobbying effort by Asian-American interest groups, SBA administratively reinstated them. No formal process was involved, but SBA recognized a new group, "Asian Pacific Americans," consisting of United States citizens from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S.

Trust Territory of the Pacific, the Northern Marinas, Laos, Cambodia, and Taiwan. Persons from these countries as well as blacks, Hispanics, and Native Americans, then, were the racial and ethnic groups considered presumptively eligible for the 8(a) program when the formal petition process began.

After that a series of groups petitioned for the coveted presumptively eligible status between 1980 and 1989. John Sullivan and I have done research on this issue and published it in 1994 in the *Journal of Policy History*. The article is reproduced in Appendix A and I will only touch on some highlights here.

Our access to this historical record came through two Freedom of Information Act requests and documents in the Carter Presidential library. The SBA shipped us more than 400 pages of rather chaotic records. Nevertheless, it has been possible to reconstruct SBA's decision-making.

During the Eighties, the SBA turned down Hasidic Jews, women, service disabled veterans, and Iranians and admitted Asian Indians, Tongans, Sri Lankans, and Indonesians to presumptively eligible status. The historical record shows some very active lobbying, the intervention of prominent members of Congress, and the Carter White House. What it does not show is any principled base of decision-making or any use of any objective data to determine which groups should be on the presumptively eligible list and which should be excluded. Some groups included on the list are at the socio-economic bottom of our society, while others, measured by income, education and business formation rates are at the top. Facts about individual group characteristics were apparently irrelevant to the SBA's decision.

in the 8(a) program intended to remedy discrimination in any particular industry. If it based on any theory at all, presumptive eligibility was intended to compensate for societal discrimination. But that has been an invalid justification for the use of a racial classification since the *Wygant v. Jackson* decision in 1986 which made the distinction between:

> "societal discrimination" which is an inadequate basis for race conscious classifications and the type of identified discrimination that can support and define the scope of race-based relief. (*Croson* at 497.)

Until last summer's *Adarand* decision, federal minority business programs have been shielded from judicial scrutiny and there are few relevant precedents. But in the only time an appellate court has examined presumptive eligibility, the concept fared poorly. In 1991 in *Milwaukee County Pavers Assoc. v. Fielder*, Judge Richard Posner writing for the Seventh Circuit stated:

> To trigger the presumption of disadvantage in the Wisconsin state programs, a subcontractor need only establish that 51 percent of its owners fall into one of four racial-ethnic groups (black, Hispanic, Asian, American Indian) or is a woman. Anyone who is not a member of one of these groups must prove that he is socially and economically disadvantaged in fact. The presumption can be rebutted, but given the difficulty of establishing whether a particular individual is socially and economically disadvantaged the availability of the presumption is likely to be decisive. This means that the state is conferring a significant benefit --access to a presumption of social and economic disadvantage that is the key to valuable entitlement – on grounds that Croson forbids a state to use without establishing that the purpose is to rectify discrimination. The state can if it wants redistribute wealth in favor of the disadvantaged, but it cannot get out from under Croson by pronouncing entire racial and ethnic groups to be disadvantaged. The whole point of Croson is that disadvantage, diversity, or other grounds for favoring minorities will not justify governmental racial discrimination other than by the federal government; only a purpose of remedying discrimination against minorities will do so. (922 F.2d 418, 422 (7th Cir. 1991).

Since that case, the judiciary has become much more critical of the use of racial classifications in a variety of settings and has specifically expanded strict scrutiny to federal

programs. In *Adarand*, racial classifications were called "odious," "pernicious" and constitutionally suspect.

Presumptive eligibility in the post-*Croson-Adarand* world is an anachronism which is not based on anything like the factual predicate courts now require for minority business programs. The courts have made it clear that rights belong to individuals, not groups. Congress should move now to replace this obsolete concept with a program that targets aspiring entreprenеurs from disadvantaged backgrounds of any race. That should be done before the courts eliminate the 8(a) program as it is now configured.

GEORGE R. LaNOUE
JOHN C. SULLIVAN, ESQ.

Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action

Almost all affirmative-action plans cover women and minorities. Who are affirmative action's sanctioned minorities? According to the U.S. Bureau of the Census, there are at least 630 ethnic groups large enough to be counted. Indeed it is doubtful if there are any countries in the world that have not contributed at least one citizen to the United States. Language defines culture and status for many people, but no one knows how many tongues are spoken in America. Students in New York City School District 24 alone converse in some 83 different languages.[1] For some persons, religion is the core of their identity. The Yearbook of American Churches lists 250 different religious groups. Finally, many Americans are most invested in their vocations or avocations and each of those activities is a minority of the total.

So who is an affirmative-action minority? Justice Lewis Powell commented in the famous case *University of California Regents v. Bakke* that:

> During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups. As the nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination.[2]

Nevertheless, in affirmative-action terms, minorities have become almost universally defined as blacks, Hispanics, Asians, and Pacific Island-

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ers, Native Americans, Eskimos, and Aleuts. But why? The Supreme Court keeps challenging governments for an answer, without a definitive response.[3]

The affirmative-action groups do not possess a common history in the manner or timing of immigration to the United States. They do not possess a common socioeconomic status. Since most Hispanics identify themselves as white, affirmative-action groups are not all "people of color." Yet almost always, the particular groups listed above are the ones covered by affirmative-action plans, and that coverage can yield tremendous benefits.

Affirmative action is the name given to a cluster of policies developed in the Sixties to create greater equality in American society and to remedy the effects of past discrimination. In its early form it was seen as temporary intervention into the processes of various competitions to ensure that all individuals were treated fairly regardless of factors such as race, ethnicity, religion, or sex. Gradually the focus of affirmative action shifted from process to outcome and from individuals to groups. Modern affirmative-action efforts concentrate on achieving proportional representation, principally in the areas of education, employment, and public contracts, for what are deemed protected groups. Today activities to redistribute educational and economic benefits under the affirmative-action rubric are firmly in place and have spread to virtually every large American government agency, private corporation, and nonprofit institution.

One of the major reasons for the logical difficulty in defining affirmative-action groups is that these programs originally focused on overcoming problems particular to blacks.[4] Other groups were added later through various political initiatives. Once added, they have labored mightily to remain in the favored category, but the reasons they were included in the first place have remained obscure. Not even the two recent definitive histories—Hugh Davis Graham's *The Civil Rights Era* (1990) and Herman Belz's *Equality Transformed: A Quarter Century of Affirmative Action* (1991)—answer this question in their almost nine hundred pages.[5] Neither Congress nor the executive branch has wanted to debate the issue publicly.[6] So the decisions were frequently delegated to mid-level bureaucrats in scores of federal agencies where records about their decisions have been largely lost or buried.

Only occasionally does an explanation find its way into print. Herbert Hammerman, the chief of the U.S. Equal Employment Opportunity Commission (EEOC) reports' unit in the period when many of the first decisions about affirmative-action policy were made, wrote a letter to

The Public Interest in 1988 recounting his recollections of the process.[7] According to Hammerman, the earliest federal list of "minority groups" appeared in Standard Form 40, which was used solely for statistical reporting purposes in employment prior to the Civil Rights Act of 1964. The designated groups were blacks, Hispanics (earlier called Spanish-surnamed Americans), Asians, and American Indians, and these categories were replicated in successive EEOC and Office of Federal Contract Compliance Programs (OFCCP) forms with little new consideration. In 1967, Hammerman urged removing Asians and American Indians from the reporting forms because there was no statistical evidence of discrimination against Asians and because American Indians living on reservations were not covered by the Civil Rights Act's Title VII. Hammerman recalls, "No one disagreed, not even the [EEOC] chairman [who explained, however that he was unwilling to take the political heat that the removal would generate]."[8]

When affirmative-action concepts changed and the racial and ethnic categories used for reporting were transformed into requirements for proportional representation in the workforce and other areas, there was still virtually no debate about which groups should be included. The concept of who was a minority was passed from program to program with very little reconsideration.

One federal agency, the Small Business Administration (SBA), however, developed a formal process for determining which ethnic groups were eligible for affirmative-action preferences in obtaining government contracts. Because the SBA process established administrative procedures, it was possible through a Freedom of Information Act (FOIA) request to document for the first time the rationales used by a federal agency in determining which groups should receive affirmative-action preferences.

There were several motivations for a group seeking SBA eligibility. Contract awards under 8(a) have totaled as much as $3.5 billion in a single fiscal year. Perhaps even more enticing was the fact that the 8(a) program became the most copied model for affirmative-action programs around the country. SBA selection of a group influenced acceptance into other major federal affirmative-action programs, hundreds of state and local programs, and even private-sector programs, such as those voluntarily established by corporations and universities.[9] Understanding the SBA's policy is a key to discerning the rationality and fairness of the inclusion or exclusion of groups in thousands of affirmative-action programs across the country.

The Small Business Administration Develops Section 8(a)

The Small Business Administration (SBA) was created in 1953 as an independent agency that would "aid, counsel, assist, and protect, insofar as is possible, the interest of small-business concerns in order to preserve free competitive enterprise."[10] The agency entered into procurement contracts with other federal agencies and then subcontracted with small businesses, which supplied the services or materials. For the first fifteen years of its existence, the SBA focused on assisting all small businesses, regardless of the race or ethnicity of the owner.

SBA policy changed after the 1967 publication of the Kerner Commission Report examining the urban riots of the preceding year.[11] The commission concluded that "special encouragement" was needed to guide blacks into the economic mainstream. Consequently, the agency decided administratively to construe its Section 8(a) authority to establish set-asides for small businesses owned by "socially or economically disadvantaged" individuals.

For the first few years, this term remained undefined, but in 1973 the SBA published in the *Federal Register* a list of five groups "presumed" to be socially or economically disadvantaged: "blacks, American Indians, Spanish-Americans, Asian-Americans, and Puerto Ricans."[12] There were no hearings or formal findings and the announcement did not explain why the SBA had gone beyond the "special encouragement" of blacks recommended by the Kerner Commission to grant affirmative-action status to other groups. Nor was there any explanation as to why these particular groups had been included.

The 8(a) program grew rapidly, increasing from $9 million in 1969 to $208 million four years later. An even larger set-aside for designated minority groups occurred in 1977, when Representative Parren Mitchell (D-Md.) offered a floor amendment to Public Law 95-28, the Public Works Employment Act (PWEA). Mitchell's amendment set aside 10 percent of $4 billion for businesses owned by "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."[13]

The following year, 1978, Congress passed P.L. 95-507, the Small Business Investment Act, providing a statutory basis to what had been for a decade a purely administratively based 8(a) program and generating a three-track system for participation in set-asides. In the first track were small businesses owned by persons belonging to groups (blacks, Hispanics, and Native Americans) considered presumptively "socially and economically disadvantaged." P.L. 95-507 defined socially disadvantaged individuals "as those who have been subjected to a racial or ethnic

prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." "Economically disadvantaged individuals" were "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired . . . as compared to others in the same business area who are not socially disadvantaged." Presumptive eligibility has meant in practice that an owner merely had to prove group membership and that the program's economic standards were met.[14] In the middle track were businesses owned by members of groups who could petition the SBA for presumptive eligibility. In the third track, individual owners were required to qualify on their own as socially or economically disadvantaged persons according to far more extensive and rigorous requirements than those for group eligibility.

Groups in the middle track petitioning for 8(a) minority status were evaluated by the SBA on several measures. Petitioners had to make an "adequate showing" that the group had suffered racial, ethnic, or cultural bias by demonstrating:

1. The group has suffered the effects of prejudice, bias, or discriminatory practices;
2. Such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in Pub. L. 95-507;
3. Such conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to all small business owners.[15]

It was the clear congressional intent that the SBA not confine 8(a) benefits solely to the groups P.L. 95-507 had listed. The House Committee report accompanying the new law stated, "There is sufficient discretion . . . to allow SBA to designate any other additional minority group or persons it believes should be afforded the presumption of social and economic disadvantage."[16] The final Conference Committee report specifically referred to a "poor Appalachian white person" as an example of cultural bias that might justify inclusion.[17] Congress had neither the political will nor the information to draw clear-cut lines of inclusion/exclusion, so that task was delegated to the administrative agency.

The SBA also understood the breadth of its mandate. After the legislation, it issued Policy and Procedural Release #2017 in 1980, which said:

Meaning of Socially or Economically Disadvantaged

Except to recommend the elimination of any suggestion that only members of minority groups are eligible for assistance under this program and to specify that the program is to aid all who are hampered in achieving full citizenship in our economic system by virtue of their social or economic disadvantages, Congress has not fully defined the words "socially or economically disadvantaged." This lack of precise legislative definition suggests that a precise definition is inappropriate, and that flexibility is warranted.

In determining whether the owners of small business concerns are "disadvantaged," consideration may be given to the following:

(a) low income;
(b) unfavorable location such as urban ghettos or depressed rural areas and areas of high unemployment or under-employment;
(c) limited education;
(d) physical or other special handicap;
(e) inability to compete effectively in the marketplace because of prevailing or past restrictive practices; and
(f) Vietnam era service in the Armed Forces (August 5, 1964, to May 7, 1975), or such other factors as contribute to a disadvantaged condition in the ordinary (dictionary) meaning of that word: lacking in basic resources or conditions necessary to achieve an equal position in society.[18]

A test of the SBA's authority came almost immediately. When P.L. 95-507 became law in 1978, the list of presumptively eligible minority groups did not include Asian-Americans.[19] Within a year, after an intense lobbying effort by Asian-American interest groups, the SBA administratively reinstated them. No formal process was involved, but the SBA recognized a new group, "Asian Pacific Americans," consisting of United States citizens from Japan, China, the Phillipines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territory of the Pacific, the Northern Marianas, Laos, Cambodia, and Taiwan. Persons from those countries as well as blacks, Hispanics, and Native Americans, then, were the racial and ethnic groups considered presumptively eligible for the 8(a) program when the formal petition process began.

Since 1979, eight groups have petitioned the agency for presumptive eligibility in the 8(a) program. SBA records include the petitions of these groups, some public comments, and agency responses, but the materials released are not complete. They reveal the arguments petitioners raised, although some specific names have been deleted. The materials also de-

scribe the agency's official reasons for its decisions. Because FOIA permits exemptions for attorney-client privileges and deliberative process materials, some SBA documents have been heavily edited. Therefore, it is not always possible to discern the internal debate, if any, within the agency about the petitions. Nevertheless, the more than 425 pages of FOIA materials are worthy of analysis because they provide the most definitive history of the decisions of any government agency regarding the inclusion or exclusion of groups for affirmative-action purposes.

Group Decisions Regarding Presumptive Eligibility

This section discusses each of the eight petitions, in chronological order by date of filing and the SBA's response. Table A summarizes the petitions and their outcomes.

Hasidic Jews

Fourteen months after P.L. 95-507 was passed, the first petition asking for inclusion in the 8(a) presumptively eligible track was filed on behalf of Hasidic Jews by the Opportunity Development Association (ODA), a private commercial organization from Brooklyn. There was considerable precedent for the request. In March 1974, the Office of Minority Business Development of the Department of Commerce had construed Executive Order 11625 to include Hasidic Jews and made ODA eligible to receive funds to provide Hasidic businessmen with management and technical assistance. Furthermore, the SBA had declared Hasidics socially and economically disadvantaged and made them eligible to receive financial aid from the Minority Enterprise Small Business Investment Company (MESBIC) program, and Hasidic firms had been a part of the old 8(a) program.

But Hasidics, like Asians, were not on the presumptively eligible list in P.L. 95-507 when it was passed. Consequently, the Washington law firm of Hughes, Hubbard, and Reid coordinated a seventy-three-page petition backed up by eighty-six letters of support, including those by Senators Jacob Javits, Abraham Ribicoff, and Charles Mathias, as well as several prominent congressmen. The Hasidic petition drew an equally energetic response. When the SBA asked in the *Federal Register* for comments, it received 151 letters, many from leaders in the black community opposing inclusion of the Hasidic Jews.

The petition combined a thorough analysis of the legal background of

Table A. SBA responses to petitions for presumptive group eligibility in the 8(a) program

Group	Petitioners	Date of Original Petition	Date of Official Decision	Outcome	Decision Rationale
Hasidic Jews	Opportunity Development Association	12/27/79	4/19/80	Rejected	First Amendment concerns
Asian Indians	National Association of Americans of Asian Indian Descent	6/30/81	2/26/82	Accepted	Comparable to Asian-Pacific group
Women	National Association of Women Federal Contractors	12/24/81	5/11/82	Rejected	Not a traditional minority
Tongans	Tongan business leaders	11/3/86	—	Accepted	August 31, 1989, expansion of Asian Pacifics class
Service-Disabled Veterans	Service-Disabled Veterans	8/10/87	12/16/87	Rejected	Vets are handicapped, not minorities
Sri Lankans	Business person (name deleted)	10/20/87	2/24/88	Accepted	Subcontinent Asian Americans
Iranians	National Association for Iranian Americans	8/17/87	1/6/89	Rejected	Not long-term-bias victims
Indonesians	Business person (name deleted)	7/24/88	3/24/89	Accepted	Asian Pacifics

MBE programs, including a description of the prejudices against Hasidics causing their disadvantages. According to the document:

> Their appearance is distinctive, their language is strange, their religious observances are resented, and their education and upbringing cause impediments in the business world. The discrimination and disadvantage resulting from these ethnic, cultural and religious characteristics are compounded by the persistence of anti-Semitism which has contributed to pockets of Jewish poverty and which victimizes Hasidics with special force. Finally, the submission explains the disabling trauma of the Holocaust on Hasidics who survived it and on subsequent generations of these survivors.[20]

The result, according to the petition, was that "Hasidics are a highly distinct and separate group of Jews" with a high concentration among the 15 percent of New York's Jewish population that was poor.[21] Still, the economic deprivation data were not very convincing because the Census collected no data on the 100,000 to 150,000 Hasidics scattered across the country. Further, the New York census tracts in which the Hasidics largely resided also contained high concentrations of blacks and other groups.

The more problematic issue was not the existence of discrimination or poverty, but whether Hasidics were statutorily or constitutionally eligible for 8(a) set-asides. The petition termed Congressman Mitchell's amendment to the Public Works Employment Act of 1977 "a highly aberrational action [because] Congress adopted a restrictive race-based definition for minority enterprises."[22] It noted that the final legislative compromise on which P.L. 95-507 was based was much broader than the PWEA. Indeed, nowhere in P.L. 95-507's legislative history was there any evidence that Congress intended to exclude any previously eligible group. Certainly, the reference to a "poor Appalachian white person" seemed expansive.[23] The petition saved its most vigorous language to combat "the suggestion that since religion was a voluntary identification," unlike race or ethnicity, that religious discrimination was of lesser consequence than racial discrimination. Concluding that there was not "a scintilla of evidence that Congress intended religious belief to be a disqualifying condition for federal assistance,"[24] the petition did not otherwise discuss the First Amendment issue.

The negative responses to the Hasidic Jew's petition were triggered by "Dear Friend" letters from Congressman Parren Mitchell, chair of the Congressional Black Caucus and chairman of the House Subcommittee

on Housing, Minority Enterprise, and Economic Development, to various black businesses and politicians. The congressman's letters made two points: (a) inclusion of Hasidic Jews would "dilute further the small percentage of existing resources earmarked for Blacks and other minorities," and (b) since "Hasidic Jews are a religious group . . . the approval of this application would appear to violate the First Amendment of the U.S. Constitution."[25]

Most of the critical letters the SBA received followed Mitchell's lead, but some evinced a clear hostility to Jews in general. The owners of a San Francisco black-owned firm wrote: "Their claim to be socially disadvantaged is inadequate on the basis that they do not form an actual ethnic group who have been historically discriminated against solely on the basis of race. In fact they could easily avoid any discrimination they might face by simply changing their names, or by not telling anyone who they are. . . . Jews of all sects including Hasidic's are a group among the wealthiest in this Country."[26] The partner of a Seattle minority design firm wrote: "Jews control a significant portion of the wealth of this country and the world, so the test of economically deprived cannot be met. If conditions of deprivation existed, the Jews would not control the significant portion of the wealth they now control."[27]

The debate soon spilled over into the Carter White House. In a memo to Stu Eizenstat, assistant to the President for Domestic Affairs and Policy, staff reported on the controversy, which was described as a "no-win situation."[28] Edward Norton, SBA general counsel, had decided the language of P.L. 95-507 made it "clear that the 8(a) program is not exclusively a racially preferential program." Furthermore, Norton concluded after a thorough review of the legislative history that "there does not appear to be a defensible legal justification for rejecting the Hasidic application," and that if such a rejection occurred litigation would result. Norton warned:

> In the event of litigation, the eligibility requirements for the 8(a) program will be strictly scrutinized by courts which might have sharply differing attitudes from SBA as to which groups should be considered socially disadvantaged. From SBA's standpoint, it is far preferable that it make those judgments.
>
> Litigation might also endanger affirmative action efforts in general. Thus far, the courts have given administrative agencies some leeway to make findings of discrimination and to take appropriate steps to remedy that discrimination. If SBA abstains from making such findings in a case where they appear to be clearly warranted, if

> not actually compelled by statute, a court might narrow substantially the authority administrative bodies now have to impose exclusively racial preferences as remedies for discrimination.[29]

Norton then proposed that the Hasidic Jews be accepted, but on such narrow grounds that other groups could not take advantage of the precedent. This would be done by defining them as an ethnic group with a strange appearance, language problems, and unusual customs. This finding, he concluded, "could be massively documented, both with anecdotal and statistical data. This would help to distinguish the Hasidim from other groups which may not be analytically distinguishable but which could not amass the same degree of evidence as can be done in this case."[30]

This arrangement appealed to the White House staff, but they noted that Parren Mitchell was opposed and that there was "significant underlying hostility to inclusion of persons of other racial minorities and Hispanics in section 8(a) programs among black contractors." Therefore the staff suggested inclusion of the Hasidim, but making it clear that the congressional language was the culprit, not the administration, and trying to convince Parren Mitchell that the Hasidim were so small that they would have a "miniscule impact . . . on other 8(a) competitors."[31]

The strategy did not work. Mitchell remained adamant and so the SBA decided that Hasidic Jews were a religious, not an ethnic, group. In its formal reply to the petition, SBA concluded that "the evidence of prejudice and discrimination experienced by the Hasidics is overwhelming and essentially unrefuted."[32] The reply detailed discrimination against the Hasidics in employment, finding customers, and in financing businesses, all of which constituted the classic complaints of minority businesses, regardless of race or ethnic group. The agency also considered the comments hostile to the inclusion of Hasidic Jews, but concluded, "Broad-base allegations about the economic power of American-Jews have no probative value."[33] Nevertheless, the SBA stated its unwillingness to grant "disadvantaged" status to a group it now defined as religious. Any other decision would represent "an abuse of discretion for SBA, absent express Congressional direction, to render a decision that might establish an impermissible religious classification."[34]

The controversy over Hasidic Jews reached the pages of the Washington and New York newspapers and was politically uncomfortable for the agency, so the process of reviewing petitions was revised dramatically. At that time (1980) there were only four groups automatically enjoying disadvantaged status: blacks, Hispanics, Native Americans (which included

Indians, Eskimos, and Aleuts), and the SBA-added Asian-Pacific Americans. In its interim rule, the agency explained: blacks had suffered "enslavement and subsequent disfranchisement" and Indians had endured "near extermination." There was no discussion as to why Hispanics and Asian Americans were entitled to 8(a) inclusion. Other groups seeking presumptive eligibility would have to follow new guidelines. A group's application would need to show "a number" of incidents not only demonstrating societal discrimination but linking these experiences to business discrimination. While there was "no limit" to the type of evidence that could be presented, the most persuasive evidence would be details of discrimination in education, employment, and business.[35]

Asian Indians

The first petition prepared under the new guidelines was submitted on 30 June 1981 by Jan Pillai, a professor at Temple University School of Law, on behalf of NAAAID, the National Association of Americans of Asian Indian Descent. The petition claimed "no ethnic community in this nation struggles so hard as the Asian Indians to overcome the social and economic disadvantages stemming from their culture, religion, and ethnic origin,"[36] but its focus was on a statistical comparison of the status of businesses owned by Asian Indians to other groups, particularly other Asian groups. Various tables based on census data were constructed. Although they showed that Asian Indian-owned businesses were small in number and in gross receipts, they did not demonstrate relative disadvantage. For example, the petition showed that Asian Indians owned .07 percent of the nation's businesses and received .05 percent of the total receipts,[37] but the census recorded that they were only .02 percent of the population. Among minority businesses, Asian Indian–owned businesses were 1.27 percent of the total but received 1.39 percent of the receipts.[38]

None of these statistics is very meaningful, however, without an understanding of relative population sizes and immigration patterns, which the petition did not discuss. Due to restriction on immigration from the Indian subcontinent, Asian Indians were among the newest of all immigrant groups to the United States and had arrived much later than the other larger Asian groups: Japanese, Chinese, Filipinos, and to some extent Koreans. In 1946, for example, there were only 1,500 Asian Indians in the United States.[39] The timing of the immigration obviously affects the age and size of businesses that a group owns, but it may not affect the relative wealth of a group. By 1990, Asian Indians had grown to

815,447 and were relatively one of the best-educated and most prosperous groups in the country. In 1980, the percentage of college graduates and managers or professionals among Asian Indians was 52 percent and 49 percent, respectively, while for all Americans it was 16 percent and 23 percent. The median family income of Asian Indians was 20 percent higher than the typical American family.[40] None of these statistics was mentioned by Professor Pillai and there is no indication the SBA ever sought them from the census.

The Asian Indian petition was rejected by the SBA on 24 September 1981 in a response less than one-tenth the length of its reply to the Hasidics. The agency declared that Professor Pillai failed to make a prima facie showing on six of the seven standards:

1. The ability of NAAAID to adequately advocate the interests of Asian Indian Americans;
2. The traits of members of the group and a showing that such traits are sufficiently common as well as a showing that the group is sufficiently discrete;
3. Evidence of long-term prejudice and discrimination in American society suffered by an overwhelming majority of Asian Indian Americans;
4. Evidence of past and present effects of discriminatory practices or similar invidious circumstances on Asian Indian Americans over which they have no control;
5. Evidence that such conditions [as per (3) and (4) above] have resulted and continue to result in substantial economic deprivation for an overwhelming majority of Asian Indian Americans;
6. Evidence that such conditions have produced and continue to produce substantial impediments in the business world for an overwhelming majority of Asian Indian Americans.[41]

The following year Professor Pillai tried again, submitting another petition, this time ninety-six pages long. The introduction was devoted to the SBA equivalent of the legal issue of standing: establishing that NAAAID was a proper advocate for the Asian Indians. The petition then addressed the issue of identifiability, an underlying theme to several of the deficiencies cited in the SBA's response. The petition termed color—"In America, skin color is a central element of identifiability"[42]—the primary characteristic setting off Asian Indians as a discrete minority.

On 26 February 1982, Professor Pillai was given the good news in a three-paragraph letter: "It has been determined that the petition is ade-

quately documented and makes a prima facie showing as to each of the standards set forth in the Rules and Regulations."[43]

In May, a notice in the *Federal Register* invited comments on the proposed inclusion of Asian Indians. The Asian Indian community was quick to respond. The SBA received 1,875 comments, representing 2,433 signatures. All but nine comments were favorable. The positive comments were summed up by the SBA as having "bolstered the facts and figures cited in the original petition."[44] Several of the negative comments reflected fear that inclusion of Asian Indians would dilute the program's benefits for other minorities. In August 1982, the agency published another notice in the *Federal Register*, which formally granted 8(a) inclusion to Asian Indians and granted presumptive minority eligibility to those from Pakistan and Bangladesh, even though no one from those countries had petitioned SBA.[45] The agency ruled that "Asian Indian Americans" would include these other countries as well, despite NAAAID's statement in its petition that "Pakistanis are essentially a religious group."[46] Seven years later the name of this group was changed to "Subcontinent Asian-Americans" and it was expanded to include those from Sri Lanka, Bhutan, and Nepal.

Women

On the day before Christmas 1981, Bosco and Curry, a Washington, D.C., law firm, submitted a petition to the SBA on behalf of the National Association of Women Federal Contractors. Like other applicants, the women contractors stressed that P.L. 95-507 was "*not limited to*" (emphasis in original) the minority groups named in the legislation, but they also had a strong case for their particular petition. They quoted the House Small Business Committee's Subcommittee on Minority Enterprise and General Oversight on P.L. 95-507, which said that "women, as a class of individuals, have been and continue to be excluded from equitable participation in our economy as business owners. This lack of access to our business system is the direct and indirect result of sex *discrimination*," and then concluded that "the government should utilize its vast purchasing power to assist female-owned businesses as well as small and minority businesses."[47] Furthermore, President Carter, in signing P.L. 95-507, commented that although the new law would principally benefit ethnic minorities, "others also face disadvantages to their entrepreneurial efforts. More must be done to assist women business owners into the economic mainstream."[48] Consequently, women-owned business enterprises (WBEs) were included in many set-asides and goal programs such as those of the Department of

Energy, the Department of Transportation, and the Federal Deposit Insurance Corporation, as well as programs operated by many state and local governments.

In the 8(a) program, however, there was a major disparity between male- (96 percent) and female-owned (4 percent—almost all minority women) firms participating.[49] Consequently, the petition urged that SBA "correct a long history of improper administration of the business development program by your predecessors."

On 11 May 1982, the SBA issued a single-page denial of the women's petition "based upon our findings that presumptive group 'social disadvantage' is primarily intended for the traditional 'minority' groups and should not be extended to the broader class of 'women.' "[50] The SBA offered to ease the rules on individual admission for women, but the National Association of Women Federal Contractors declined to cooperate and wrote, "Rather, we will direct our attention to bring substantial political and, if necessary, legal attention to this matter."[51] In 1988, their effort bore fruit when Congress passed the Women's Business Ownership Act. It required the SBA to administer procurement preferences for women-owned businesses in federal contracts parallel to, but apart from, the 8(a) program.

Tongans

The Tonga Islands are located in the South Pacific approximately 1,700 miles north of New Zealand. Almost all Tongan-Americans have immigrated to the United States recently, as the result of Mormon missionary activity.[52] The Tongans petitioned the SBA on 3 November 1986, and because nearly twelve thousand Tongans lived in Utah, their petition was accompanied by a letter from Utah Republican Senator Jake Garn, who asked for every "fair consideration."[53]

The Tongans' brief petition made several points. First, they "did not enjoy benefits afforded to several other select minority groups," including their Pacific island neighbors of Samoa, Guam, the U.S. Trust Territory of the Pacific Islands, and the Northern Mariana Islands, previously accepted as presumptively eligible by the SBA in 1979. The petition also mentioned that Tongans were of Polynesian ethnic origin and that the main reason for their social disadvantage was "our general lack of command of the English language" because many Tongan immigrants were older and had difficulty learning English.[54]

Five months later the Tongans' petition was denied because the group had not provided evidence that (a) the number of potential 8(a) appli-

cants "is sufficiently substantial to warrant determination of minority group status" or that (b) Tongans have suffered long-term prejudice in American society. Finally, the agency noted that the designation of Tongans as "Polynesian Americans" was not persuasive since that was not one of the specified groups presumed disadvantaged.[55]

Despite the many deficiencies of the Tongan petition, and the fact that the Tongans did not follow the agency's suggestion of reapplying with more complete documentation, the group eventually gained the 8(a) status it desire. In 1989, the SBA added nine tiny Pacific locales to its list of covered Asian-Pacific American ethnic groups; one of them was Tonga.[56]

Disabled Veterans

On 10 August 1987, John K. Lopez, chairman of the Service-Disabled Veterans Institute, wrote a letter to George Bush, then Vice President and a former naval officer. Lopez began his letter by cataloging some of the groups entitled to various procurement preferences in the federal governments: "ethnic minorities, women, labor surplus areas, *even incarcerated prisoners* (emphasis in original) . . . groups for which membership is primarily a circumstance of birth or geography." Awarding 8(a) inclusion to some of these groups but not disabled veterans, he concluded, "is an incomprehensible act of discrimination."[57]

The SBA did not agree. The agency replied to Lopez by ruling that his petition was deficient in four areas. First, he did not establish that veterans suffered the effects of discriminatory practices over which they had no control. The agency acknowledged there were sufficient data detailing the socioeconomic hardships endured by handicapped veterans, but the SBA pointed to the correlation between unemployment and the severity of the disability to show that the disability itself, not prejudice against disabled veterans, caused high unemployment among disabled veterans.

The second alleged deficiency of the petition was its failure to establish that prejudice inflicted on disabled veterans has been "chronic" and "long-standing." The petition limited itself to prejudice against veterans in the past two decades, allowing the SBA to declare that "there is no evidence, however, that the 'prejudice' discussed in the petition predates the Vietnam era."[58] The third weakness was the lack of distinction between disabled veterans and civilian handicapped individuals.[59] The agency stated, "In our opinion, the prejudices complained of are no different from those of civilian handicapped individuals." Therefore, the SBA

argued, the appropriate protection for prejudices against handicapped veterans attempting to start small businesses was not 8(a) but the Rehabilitation Act.[60]

The SBA also argued against the veterans' interpretation of legislative intent. The veterans had cited P.L. 93-237, mandating the SBA to give "special consideration to veterans." Their application also included a 1972 government press release in which the Veterans Administration and the SBA apparently agreed that "under the same program that previously has applied only to minorities and other disadvantaged persons, veterans are now eligible for Federal contracts (under section 8[a] of the Small Business Act)."[61] But the SBA declared special consideration did not necessitate "*mandatory* eligibility" (emphasis in original), nor did it create a presumptive social disadvantage. According to the agency, the phrase "special consideration" did nothing more than "provide added emphasis where eligibility already existed."[62] Since the issue was eligibility, this tautological interpretation rendered the words "special consideration" a nullity because there was no need for the benefit to be added once eligibility has already been achieved.

The SBA's legislative intent focus was on P.L. 95-507, which designated certain groups as socially disadvantaged. Handicapped veterans were not one of those groups, leading the SBA to declare: "Since Congress knew that Vietnam era veterans participated in the predecessor of the 8(a) program and did not include veterans as a socially disadvantaged group in Pulic Law 95-507, we can only conclude that Congress did not intend for veterans to be so designated."[63] Such a conclusion seems unjustified. Prior to the application of the disable veterans, the SBA expanded its list of presumptively eligible groups to include persons from eighteen Asian countries, none of which was specifically designated in P.L. 95-507.

Sri Lankans

In October 1987, the SBA received a letter from a business owner whose origins were in Sri Lanka, formerly Ceylon. Two years earlier, the owner had applied for 8(a) status and was told he did not belong to a group designated as "socially disadvantaged." Because the SBA had previously determined that persons from India, Pakistan, and Bangladesh were eligible and because, as the owner pointed out, standard reference volumes referred to Sri Lanka as part of the Indian subcontinent, the owner asked for reconsideration. Four months later the SBA General Counsel wrote a memorandum stating:

> Sri Lankans possess identifiable physical characteristics, cultural and religious practices, ideological development, and historical origins in common with Asian Indians. Because Sri Lankans identify themselves with the same discrete minority group to which Asian Indians belong, and because American society identifies Sri Lankans as belonging to that same group, Sri Lankans should be considered members of the "Subcontinent Asian Americans" designated minority group.[64]

There is a logic in this response, but neither the procedural nor the substantive standards that the SBA required in other petitions were followed here. There was no showing that the owner represented other Sri Lankans or that Sri Lankans were a large enough group to merit special designation. There was no requirement that any statistics be supplied about the economic status of Sri Lankans in the United States, and no opportunity for public comment. In the eyes of the SBA, the proximity of geography, culture, and "physical characteristics" to Asian Indians was enough for 8(a) eligibility.

Iranians

The opening paragraph of the 1987 petition on behalf of the National Association for Iranian Americans characterized 8(a) designation as "extremely important . . . since it would no longer require each and every Iranian American to undergo the almost impossible task of individually proving their social and economic disadvantages."[65] An estimated five hundred thousand to one million Iranians were thought to be in the United States.[66]

According to the petition, persecution of Iranians in this country reached its highest level in 1979–80. Much of the blame for this hostile public attitude was placed on Presidents Carter and Reagan; the latter, it was claimed, invariably described Iranians as "barbarians."[67] As proof, the petition quoted a *U.S. News and World Report* article, which stated: "Iranian American establishments have been set ablaze. Iranians have been assaulted, verbally abused, and forced from jobs and schools in the fiercest outbreak of prejudice against an ethnic minority since the anti-Japanese frenzy in the early days of World War II."[68]

Economic census data were used to conclude that the average household income of Iranians was "only somewhat above the poverty level, [which] places Iranians 38th among the 42 foreign born groups in the census."[69] But the key to the Iranian strategy was to compare themselves

to Asian Indians. According to the petition, Asian Indians enjoyed a median income 225 percent higher than that of Iranians, a differential caused, it was claimed, by the recognition by the SBA of Asian Indians as an 8(a) minority group.

But the Iranians also realized that the SBA decisions were not really based on group economic status, so the petition tried its best to establish a cultural and racial affinity with Asian Indians. The petition pointed out that the official Iranian language was Farsi,"which is rooted in Sanskrit which is the root of all 15 languages spoken in India." Language had never been a key to inclusion, however, so the petition devoted a major effort to race and color. It insisted that

> the majority of Iranians are of the Indo-European race. Descendants of other races, such as Turks and Mongolians, have also over the course of history made Iran their home. Nevertheless, their number is small and they are concentrated mainly in small towns along the national borders. Mainly due to the Indo-European race, the majority of Iranians have dark complexions which make them easily identifiable. Due to the color of their skin, Iranians are commonly mistaken for Hispanics or Indians (two groups who have already received recognition by the SBA as socially disadvantaged minority groups). It is important to note that, in terms of complexion, the only noticeable difference between an Iranian and an Indian, Pakistani, or Bangladeshi is that the skin color for the latter group is somewhat darker. It is therefore very easy to mistake one member of the above listed group for another. This, in fact, happens frequently even among the members themselves.[70]

On 23 November 1987, Wilfredo Gonzalez, SBA associate administrator for Minority Small Business and Capital Ownership Development, responded negatively to the Iranians, rejecting them in part due to a lack of evidence detailing long-term prejudice. The petition's examples dating from the beginning of the 1979 hostage crisis were thought not sufficiently long-standing. The response also focused on the Iranians racial claim:

> Do you seek disadvantaged status only for individuals of the Indo-European race or for all individuals who can trace their lineage to Iran?
>
> Moreover, in describing the group, the petition identifies the official language and principal religion of Iran and states that Iran has

> the same language as Afghanistan and principally the same religion as is prevalent in Iraq. Why should the SBA consider a petition for Iranian Americans and not, for example, for Iraqi Americans?[71]

On the surface, the agency's response seems strange. The petition was not seeking disadvantaged status for all members of the Indo-European race. The narrow interests of the National Association of Iranian Americans were obvious. Clearly, the Iranians were not urging preferred status for Iraqis when the two nations were then engaged in a bitter and bloody war. Furthermore, the SBA had not previously used this kind of domino argument—if we accept one group, we will have to accept others—in dealing with other Asian groups. But that was precisely the fear. The Indo-European linguistic and racial group (formerly called Aryan), according to anthropologists, stretches from Western Europe to the Indian subcontinent.[72] Having never applied consistent standards for determining economic or social deprivation, had the SBA accepted a group on the basis of their Indo-European affinity with other included groups the door would have been opened, at least, for other peoples from the Middle East or Asia Minor,[73] as it used to be called, and maybe for Europeans as well.

In February 1988, Sidley and Austin, the Washington, D.C., law firm that had prepared the initial petition, responded to the SBA's rejection with a long letter detailing evidence of discrimination against Iranians prior to 1979 and included synopses of three federal court cases, two from the Woodrow Wilson presidential era and one from 1972. The letter also supplied the agency-requested clarity about the exact group seeking 8(a) inclusion by explaining in a footnote that Turks and Mongolians were merely "temporary conquerors ultimately absorbed into the dominant Indo-European race."[74]

At first it seemed the revised petition had made some impact. On 28 July 1988, David Kohler, the SBA's associate general counsel, determined that the Iranians had made enough of a case that he recommended publishing a notice of their pending disadvantaged recognition in the *Federal Register* for public comment, usually the crucial first step in agency approval. Six months later he changed his mind, he said, after further examination of the SBA's regulations.[75]

On 6 January 1989 the Iranians were told their petition was again rejected. Four reasons were listed. The agency said the revised petition failed to show long-term discrimination against Iranians because the cases cited involved Syrians, not Iranians. Second, a satisfactory link between the census data on income to prejudice and bias was not created. "There are a number of possible explanations for the economic disparity between

Iranians and other groups," the reply claimed, although the SBA provided no such explanations.[76] Third, the agency felt that Iranians were "too narrow" as a group. The agency insisted that "SBA has never admitted individuals with origins limited to one country as a group whose members may be considered socially disadvantaged. Groups that are designated to be socially disadvantaged for purposes of the 8(a) program are defined more by cultural affinity than by country of origin."[77] While it is true that the Tongans, Indonesians, and Sri Lankans were admitted as part of geographic clusters and not as isolated nations, this was really a matter of bureaucratic convenience rather than careful ethnographic analysis. Was there a common "cultural affinity" within the Asian Pacific group between Chinese and Samoans admitted in 1979? Or between Cambodians and Japanese? Finally, the agency argued that the discrimination against the Iranians was merely "politically motivated" and as such was not the type of prejudice or bias for which the 8(a) program was established to remedy. "This approach was necessary," the agency claimed, because "political moods change over time and a group that is being politically ostracized today may be fully accepted tomorrow."[78]

Indonesians

During the period the agency was considering the Iranians, the SBA received a letter from an Indonesian-born American citizen who owned a small business in California.[79] She recounted how, although she had office experience in Indonesia, language and cultural barriers forced her to begin her economic journey by cleaning houses in the United States. She soon became a dishwasher and then a waitress until, improving her English, she could begin her own business. It was a tale that could be told by many immigrants.

In the early part of 1988, her business received MBE certification by several local agencies and she applied to the SBA for 8(a) certification. The SBA, however, turned her down because Indonesian-Americans were not named as "members of [a] designated group." Failing as an individual applicant, despite her rather heroic personal odyssey, she, not surprisingly, decided to petition for group 8(a) eligibility for all Indonesian-Americans. A country of nearly 200 million inhabitants, Indonesia has furnished a relatively small number of immigrants to the United States. She conceded that there were only about twenty thousand Indonesians in the United States and asserted there were no statistics about their collective status. Actually, however, there were such Census data showing that, although one of seven Indonesians was below the poverty level, on average members

of the group were better educated, had better jobs, and were more prosperous than other Americans.[80]

Nevertheless, she insisted, following the linguistic cues in SBA documents, that Indonesians were like the other Asian Pacifics in America who had been previously included and:

> My color is yellow like other Indonesian Americans I know. . . . Asian Pacific Americans have suffered the chronic effects of discriminatory practices for a very long time, over which they have no control, and, Indonesian Americans, most definitely included have suffered economic deprivation. This has impacted all the Indonesian Americans I know in a most negative way. Good jobs are scarce regardless of talent. Language and color are a barrier to both employment and a good education. Indonesian-Americans have no business history.[81]

The petition also included a map of Southeastern Asia with Indonesia doubly underlined so the SBA would be certain to know where the country was located.

On 24 March 1989, the SBA general counsel informed the petitioner of her success. The SBA had decided to publish for public comment a proposal to add Indonesians to the already included Asian-Pacific American cluster. The record shows only one such comment received—that from another Indonesian-American businesswoman who had also previously been rejected as an individual for 8(a) certification. Needless to say, she was enthusiastic about prospective group inclusion. The SBA later added Indonesians as a group to its presumptively "eligible list."

Patterns in Presumptive Eligibility

The SBA's response to the eight petitions for presumptive eligibility in its 8(a) program provides the only systematic documentation thus far available of federal decisions about group eligibility for affirmative-action preferences. However, as noted earlier, these papers do not reveal all the internal policies of the agency or the external pressures placed on the agency. If the communications were not made in writing or if the agency has deleted them from the FOIA request, the record is incomplete.[82] Still the documents constitute the formal administrative history of these decisions. As such they are an appropriate basis for evaluating the logic and fairness of the decisions.

Examining this record, it is difficult to discern any consistent application of the agency's published procedural or substantive standards. While determining the relative social disadvantages of groups may be necessarily subjective, the relative economic disadvantage of groups is quantifiable and the data were often available from census records. The SBA never used the data and never analyzed them when petitioners introduced them, but instead employed a hodgepodge of rationales that appear largely to be pretexts for its decisions. The putative requirement that there be evidence of "long-term" prejudice and discrimination in American society, used to exclude Iranians, was not applied to other new immigrant groups such as Asian Indians or the Asian Pacific Islanders. Similarly, the application of the standard that groups not be too narrow and represent only an individual nation, which was used against the Iranians, is inconsistent with the fact that when the SBA expanded eligibility throughout much of Asia, the agency did so by particular countries: Burma, Japan, etc. It informed the Tongans in 1987 that they were too small to "warrant an SBA determination of minority group status" but admitted them in 1989 along with people from the Marshall Islands and Micronesia.[83] The SBA turned down women because it did not wish to extend beyond "8(a) traditional minority groups," although women were participants in other federal programs and evidence of cultural discrimination against women in business was substantial. In 1988, Congress effectively overturned that decision by forcing women into the rest of SBA's portfolio, but women are still not eligible for 8(a) set-asides. The agency rejected disabled veterans, although disability and veteran status are common in other affirmative-action programs. Although Hasidic Jews were already eligible for other Department of Commerce and SBA programs, and the existence of discrimination against them was clear, they were excluded from 8(a) participation ostensibly on constitutional grounds. This is a complex area of law that can be argued either way, but the SBA ruled without citing any statute or court case.

On the other hand, when the agency did expand eligibility, as it did in 1979, when persons from twelve Asian countries were brought in, or, in 1982, when the persons from the Indian subcontinent were included, it did so without any independent examination of the actual social or economic status of those groups in America. Had the SBA done so, it would have discovered that Asian Americans are the best educated and most prosperous of all the nation's larger racial groups and, as a relatively new immigrant group, have made great strides in developing businesses.[84] But the agency seemed to accept the argument made to the SBA by the Asian American Commission of Washington State in a 1979 letter:

> Asian/Pacific Americans, Blacks, Hispanics, and Native Americans all share a well-documented, common history of racism, discrimination and exclusion. That we are people of color serves as the common denominator for such treatment even today. This should be the foundation for qualifying as a "socially and economically disadvantaged" minority group.[85]

The Asian Indians' petition repeated this theme in its assertion that, "in America, skin color is a central element of identifiability . . . the primary characteristics setting off Asian Indians as a discrete minority."[86]

A skin-color hypothesis would explain why the agency accepted persons from every nonwhite Asian country but rejected Iranians, and, for that matter, why it did not add Afghanis when it added Nepal and Bhutan in 1989. It would also explain why the petitions of the Hasidic Jews, women, and disabled veterans were rejected.

The SBA's decision to draw a "people of color" line around its 8(a) program was not consistent with its understanding of any formal congressional mandate, as evidenced by its formal Policy and Procedural Release No. 2017, quoted earlier.[87] But, informally, the agency was pressured by Parren Mitchell, who until 1987 chaired the House Subcommittee controlling the SBA's future, and by the groups already in the program not to "dilute the resources earmarked for blacks and other minorities."

To draw the "people of color" line, as SBA appears to have done in 8(a), is to ignore the reality that in the world of small businesses race and ethnicity are not very good surrogates for size or success. In 1982, 64 percent of all businesses owned by white males had net receipts of less than $25,000, compared to 69 percent for Hispanics, 70 percent for blacks, and 65 percent for other minorities (mostly Asian). Similarly 81 percent of all businesses owned by white males had no paid employees compared to 84 percent Hispanic, 87 percent black, and 81 percent other minorities.[88]

In 1989, the Supreme Court ruled in *City of Richmond v. Croson* that state and local MBE programs must provide specific evidence of discrimination about each racial and ethnic group eligible for business preferences.[89] Consequently, jurisdictions all over the country are reexamining their own programs and sometimes eliminating groups for which no discrimination can be shown. But the Supreme Court ruled in *Fullilove v. Klutznick* (1981) that Congress, and by extension, the federal agencies, had broad authority to grant business preferences to various racial and ethnic groups without judicial supervision. Despite repeated congressional admonitions that 8(a) beneficiaries should not be defined strictly on racial

grounds, 99 percent of all 8(a) benefits go to businesses owned by members of the "people of color" groups that SBA has designated as presumptively "socially and economically disadvantaged."[90] The SBA's reliance on the "people of color" ideology has led it to a position inconsistent with both the historical record and the contemporary evidence of discrimination in America. It has included groups (Tongans and Sir Lankans) for whom there was no history of discrimination because they were barely present in the country until recently, while excluding groups that have faced discrimination since the founding of the Republic (Jews and women). By refusing to apply an empirical test of contemporary socioeconomic status, the agency was left with no principled basis on which to include Asian Indians and exclude Iranians, both recent immigrant groups. Because of broader patterns of immigration that the SBA has not considered, Asian and Hispanic American businesses are growing much faster and receive more 8(a) benefits than black Americans,[91] so the original motivation for the program is being eroded.

The SBA has compounded the problems caused by its earlier decisions by taking the position that the agency does not have the authority to review rejections of petitions. Eight years after the Hasidics were rejected, they reapplied but were told agency rules did not permit reconsideration.[92] Nor will the agency reexamine whether a group made eligible because it was socially and economically disadvantaged at one time should remain in that category indefinitely.[93] In the 8(a) program, once a group is in, apparently it is always in. Unless Congress acts, once the SBA finally rules a group out, it is indefinitely out.

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Notes

1. Laurel Shaper Walters, "Immigrants Flood New York City Schools," *Christian Science Monitor*, 18 May 1992, 1.

2. 438 U.S. 265, 292 (1978).

3. See, for example, Justice Douglas in *DeFunis v. Odegaard*, 416 U.S. 312, 337–40 (1974), Justice Powell in *Bakke* at 309 (1978), Justices Stewart and Stevens commenting separately in *Fullilove v. Klutznick*, 448 U.S. 448, 530, 535–36 (1980), Justice O'Connor in *City of Richmond v. Croson*, 486 U.S. 469, 506 (1989).

4. See, for example, Richard N. Goodwin's chapter, "Beyond Civil Rights," in *Remembering America* (Boston, 1988), when discussing the preparation of Lyndon Johnson's Harvard Commencement address, where the rationale for affirmative action was first set out (342–49).

5. Hugh Davis Graham (New York, 1990) and Herman Belz (New Brunswick, 1991). Graham does discuss the Nixon administration's specific inclusion of Cuban-Americans in the Spanish-surnamed group. Cuban-Americans tended to be relatively conservative, affluent, and Republican (328).

6. The issue of which groups to include in federal minority business programs is mentioned only in passing in the standard histories of federal MBE programs. George Lee Hopkins, "Contracting with the Disadvantaged Sec 8(a) and the Small Business Administration," *Public Contract Law Journal* 7:2 (August 1975): 169–217. Parren J. Mitchell, "Federal Affirmative Action for MBE's: A Historical Analysis," *National Bar Association Law Journal* 9 (1981–82): 1–22. Jess H. Drabkin, "Minority Enterprise Development and the Small Business Administration's Section 8(a) Program: Constitutional Basis and Regulatory Implementation," *Brooklyn Law Review* 49 (1983): 433–77. The most definitive study of federal MBE programs mentions the specific SBA exclusion of Hasidic Jews but otherwise does not comment on the group inclusion/exclusion issue. Daniel A. Levinson, "A Study of Preferential Treatment: Evolution of Minority Business Enterprises Assistant Program," *George Washington Law Review* 49 (1980): 1–99.

7. Herbert Hammerman, " 'Affirmative-Action Stalemate': A Second Perspective," *The Public Interest* (Fall 1988): 130–34.

8. Ibid., 131

9. That is one of the reasons that local minority business programs included the same list of eligible groups as those identified by the SBA. This imitation of the SBA list has begun to cause trouble. In *City of Richmond v. Croson*, the Supreme Court criticized the city for granting set-aside preferences to "Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons" without any evidence of past discrimination against those groups or even any indication that Richmond had an Eskimo or Aleut citizen. At 506.

10. 15 U.S.C. 631(a) (1971).

11. U.S. Code Congressional and Administrative News, 3843.

12. 13 C.F.R. 124.8–(c) (1973).

13. 42 U.S.C. 6705 (f)(2). In June 1980, the Supreme Court upheld the validity of these set-asides in *Fullilove*.

14. Owners are supposed to have a net worth of less than $250,000.

15. 13 C.F.R. 124.105(d)(2)(i–iii).

16. H.R. Rep. No. 949, 95th Cong. 2d sess., 1978, reprinted in Legislative History of the Small Business Act and Small Business Investment Act of 1958, Amendment, vol. 1, Committee Print at 56.

17. Legislative History, P.L. 95–507, 3882

18. Revised 1 May 1980.

19. Parren Mitchell, the principal policymaker for MBE programs, said the omission of Asian-Americans was "inadvertent." Native Americans were not included until added in the Conference Committee report.

20. "Application of Opportunity Development Association and others for Designation of Hasidic Jews as a Socially and Economically Disadvantaged Group Pursuant to 13 C.F.R. Sec. 124.1–1(3)(iii)," 27 December 1979, 4–5.

21. Ibid., 43.

22. Ibid., 10.

23. Ibid., 20.

24. Ibid., 28.

25. Letter, 22 February 1980.

26. Letter from Frederick E. Jordan to William Clement, associate administrator, Minority Small Business and Capital Ownership Program, 3 March 1980, 1.

27. Letter from Carlos A. Young to William Clement, 3 March 1980, 1.

28. Memo from Harry Schwartz and Bob Malson to Stu Eizenstat, "Application of Hasidic Jews for Designation as a Socially Disadvantaged Group Entitled to Minority

Procurement Set-Aside and Minority Subcontractor Benefits," 21 February 1980, 2. These White House papers come from the Carter Library, and I am indebted to Hugh D. Graham, Holland N. McTyeire Professor of History, Vanderbilt University, for unearthing them.

29. Memo from Edward W. Norton to Harry K. Schwartz, "Hasidic Application for Designation as a Socially Disadvantaged Group," 4.

30. Ibid., 8.

31. Schwartz-Matson memo (see note 28).

32. SBA Decision, 8 April 1980, 6.

33. SBA Decision, 8 April 1980, 12.

34. Ibid., 25. There had been no such First Amendment concerns six years earlier, when the Hasidic Jews received minority status from the Office of Minority Business Development in the Department of Commerce. This inconsistency within the federal government cannot be logically reconciled.

35. 45 FR 79415 (1 December 1980).

36. "Petition of National Association of Americans of Asian Indian Descent (NAAAID) for Inclusion of Asian Indians as a Majority Group Eligible for Participation in SBA's Section 8(a) Program in Parity with Asian Pacific Americans and Other Recognized Minorities," 30 June 1981, 9.

37. Ibid., 56- 57.

38. Ibid., 6.

39. Ronald Takaki, *Strangers from a Different Shore: A History of Asian Americans* (Boston, 1989), 420.

40. "Civil Rights Issues Facing Asian Americans in the 1990's," U.S. Civil Rights Commission, Washington D.C., February 1992, 12–13.

41. Letter from Michael Cardenas to K. G. Jan Pillai, Esquire, 24 September 1981.

42. Asian Indian Petition, 33.

43. Letter from Robert L. Wright Jr., associate administrator for Minority Small Business to Jan Pillai, 26 February 1982.

44. SBA memorandum by Robert Wright, 19 July 1982.

45. SBA Notice by Robert Wright and James C. Saunders, 16 August 1982.

46. Asian Indian Petition, 40.

47. Letter from attorney Joseph A. Bosco to Michael Cardenas, 24 December 1981, 6.

48. Office of the White House Press Secretary, 25 October 1978.

49. Letter from Joseph Bosco to Michael Cardenas, 24 December 1981, 8.

50. Letter of 11 May 1982 from James C. Saunders to Joseph A. Bosco. This is consistent with the position the SBA was taking in denying the application of individual women-owned businesses for 8(a) status. For example, on 30 May 1980, Margaret Shaffer of Paradigm, Inc., received the following denial letter from William A. Clement Jr., associate administrator for Minority Small Businesses: "Sexual discrimination is not included as one of the elements which may lead to determination of social disadvantage, and neither does the Small Business Administration equate sexual discrimination to cultural bias."

51. Letter from Karen Olsen to Herberto Herrera, Deputy Administrator, 23 February 1983.

52. The history of Mormons' missionary activity to the Tongans is recounted in R. Lanier Britsch, *Unto the Islands of the Sea* (Salt Lake City, 1986).

53. Letter from Senator Jake Garn to Wilfredo Gonzalez, associate administrator, Minority Small Business and Capital Ownership Development, 3 November 1986.

54. Letter from an unknown author to Wilfredo Gonzalez, 3 November 1986.

55. Response from Gonzalez to unknown petitioner, 23 April 1987.

56. Actually, in March 1989, three years after the Tongan petition, when the SBA added eight places to the Asian Pacific group, Tonga was not one of them. In August of that year the explanation for Tongan exclusion was revealed in the *Federal Register* (54 FR 34696). The SBA admitted "that it inadvertently omitted" Tonga from its listing of coun-

tries whose people are regarded as Asian Pacific American. The agency's cavalier treatment of the Tongans was also inflicted on the Laotians in 1989, when they were inadvertently dropped from the same group and then later restored.

57. Letter from John Lopez to George Bush. According to the *Statistical Abstract of the United States*, in 1988 there were 2,199,000 veterans receiving compensation for injuries sustained in the service (10 August 1987).

58. Letter from Wilfredo S. Gonzalez to John Lopez, 16 December 1987, 2.

59. Ibid.

60. 29 U.S.C. 793–94.

61. SBA 1 August 1972, 72–56 Press Release, 3.

62. 16 December 1987 response, 3.

63. Ibid.

64. Memorandum from Robert Bluebber, general counsel to Francisco Marrero, 24 February 1988, 4.

65. "Petition for Designation of Iranian Americans as a Socially Disadvantaged Minority Group (Pursuant to Public Law 95-507 and 13 C.F.A. 124.105) Before the Small Business Administration," 1. For example, Iranian petition, "A favorable petition by the SBA will ipso facto allow Iranian Americans to become eligible to participate in other Federal, state, and local programs" (9).

66. This represents an unverifiable estimate because the general census does not maintain statistics on Iranians as a discrete ethnic group.

67. Ibid., 28–29.

68. 10 December 1979, 35.

69. Ibid, 33.

70. Ibid, 19.

71. Letter from Wilfredo Gonzalez to Gary Gasper, attorney, Sidley & Austin, 23 November 1987, 2.

72. Felix M. Keesing, *Cultural Anthropology* (New York, 1966), 372, and Roger Pearson, *Anthropological Glossary* (Malabar, Fla., 1985), 126–27.

73. Later the agency asked if the logic of the Iranian petition would not lead to minority status for Syrians as well. Letter from Joseph O. Montes, associate administrator, Minority Small Business and Capital Ownership Development, to Gary J. Gasper, 6 January 1989, 2.

74. Letter from Gary Gasper to Wilfredo Gonzalez, 31 January 1988, 8.

75. Memorandum from David A. Kohler to Francisco Marrero, director, Office of 8(a) Program Eligibility, 31 January 1988.

76. Letter from Joseph O. Montes to Gary J. Gasper, 6 January 1989, 3.

77. Ibid., 3–4. The rejection letter carries this point to a bizarre conclusion. It chastises the Iranians for comparing themselves to Vietnamese Americans and for arguing that since the Vietnamese were included that the Iranians should be. The letter states that "Vietnamese Americans have not been designated as a minority group by SBA. SBA's regulations have designated Asian Pacific Americans, of which Vietnamese Americans are a small part, as socially disadvantaged group. . . . Thus any comparison between Iranian Americans and Vietnamese Americans for the purpose of supporting a petition by Iranian Americans is misplaced." Actually the Iranians never made comparisons with the Vietnamese, who were the poorest of the Asian group, but compared themselves with Asian Indians, who were the wealthiest. If the unpublished census data on which the Iranians relied are accurate, the median household income for them in 1979 was less than that for any other group in the Asian Pacific cluster. The SBA's argument, in addition to being factually incorrect, seems to suggest that it is better to determine economic and social disadvantage by large geographic areas than by smaller groups that do have distinctive cultures and histories of discrimination. The only thing people in the far-flung Asian Pacific category really have in common is that they are nonwhite.

78. Ibid., 5.

79. Letter from unknown person to Larry Parkinson, 25 July 1988.

80. "Civil Rights Issues Facing Asian Americans in the 1990s" (see note 40).

81. Ibid., 3.

82. Much of the section detailing examples of discrimination against Iranians was deleted by the SBA when it responded to the FOIA request. The agency made similar deletions in the sections of anti-Semitism and the Holocaust in the Hasidic Jewish petition. It is not clear what rationale under FOIA law the SBA used to make these deletions from the petitions it received. We have been successful in acquiring some deleted material by finding followup petitions with the SBA or contacting those who filed the original petition.

83. Letter from Wilfredo Gonzalez to unknown recipient, 23 April 1987, 2.

84. The most comprehensive assessment of the relative status of Asian-Americans can be found in "Civil Rights Issues Facing Americans in the 1990's" (see note 40). While this report documents some evidence of continuing discrimination against Asian Americans, it also shows that on average they are better educated, more likely to be managers or professionals, have less unemployment and a higher median income than the American population in general (11–12).

Timothy Bates, after conducting a careful economic analysis of minority businesses, concluded: "From a policy standpoint, an essential factor stands out. Self-employed Asians are not a disadvantaged group: their eligibility for government minority business set-asides and preferential procurement programs, financial assistance, subsidized technical assistance, and so forth is completely inappropriate. Their status as a "disadvantaged minority group" is history and it is time to adjust public policy to reflect this new reality." "The Changing Nature of Minority Business: A Comparative Analysis of Asian, Non-Minority, and Black-Owned Business," *Review of Black Political Economy* 18 (Fall 1989): 26.

There are some major differences among Asian groups in business participation. Japanese, Chinese, and Koreans are substantially above the national average, while Filipinos are much lower. Frank A. Fratoe and Ronald L. Meeks, "Business Participation Rates of the 50 Largest U.S. Ancestry Groups: Preliminary Report," (Washington, D.C., 1985).

85. Diane Wong, executive director, Commission on Asian American Affairs, letter to Lester Fettig, administrator, Office of Federal Procurement Policy, 16 April 1979.

86. Asian Indian Petition, 33.

87. Procedures Relating to Eligibility Determinations of Disadvantaged Businesses: "In determining whether small business concerns are socially or economically disadvantaged, reliance should not be placed upon a single factor, but on a composite of such factors as the social or economic background of the principal owners, controlling individuals and managers of the concern, along with the general pattern of their life, opportunities and education which have prevented them from obtaining financial or other assistance available to the average entrepreneur in the economic mainstream. Such persons may often include, but are not limited to Negroes, Indians, Eskimos, Aleuts, and persons of Mexican, Puerto Rican, Cuban, Filipino, or Oriental extraction."

88. Bureau of the Census, 1982 Characteristics of Business Owners, Table 3B, p. 12, and Table 4C, p. 22.

89. Croson, at 506.

90. Office of Minority Small Business and Capital Ownership Development, 10 April 1992.

91. In FY 91, blacks received 41 percent of the SBA contract dollars, but Asians received 18 percent and Hispanics 30 percent. Letter from Janelle Booker, Program Liaison, Office of Minority Small Business and Capital Ownership Development, 10 April 1992.

92. Letter from Francisco Marrero, director, Office of Program Eligibility, to Rabbi Zvi Kesterbaum, executive director, ODA, illegible date.

93. Telephone interview, Amy Mertz, attorney for the SBA, 23 April 1992.

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

PHILIP LADER
ADMINISTRATOR
U.S. SMALL BUSINESS ADMINISTRATION

BEFORE THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS

September 18, 1996

Madam Chairman and Members of the Committee, thank you for this opportunity to appear before you today to discuss your proposed legislation, H.R. 3994, and the U.S. Small Business Administration's (SBA's) Minority Small Business and Capital Ownership Development (MSB&COD) Program, which I will also refer to as the Minority Enterprise Development (MED) Program, or 8(a) Program. I am Philip Lader, Administrator of the SBA, and am accompanied by Calvin Jenkins, Associate Administrator for Minority Enterprise Development, John Spotila,the SBA's General Counsel and our Agency's lead liaison with the Justice Department regarding this program, and Hugh Wright, the SBA's Washington District Office's Assistant District Director for Minority Enterprise Development.

Permit me to take this opportunity to introduce Ronald Hobson, SBA's newly appointed Associate Deputy Administrator for Government Contracting and Minority Enterprise Development. I look forward to working with Mr. Hobson, who joins us from Signet Bank. He brings fresh analytical insights and approaches to the highly interrelated matters of finance, government contracting, and business development.

The Clinton Administration is committed to the goal of expanding opportunity for all Americans to participate in our free enterprise system and in Federal procurement. The President has strongly stated his commitment to "mend, not end" Federal affirmative action programs. To achieve this goal, SBA has sought

to strengthen and improve the 8(a) Program as a business development program designed to help eligible small business firms which are socially and economically disadvantaged reach self-sufficiency and competitive viability. This was its intent when it was established in the Nixon Administration, and business development has been reemphasized as its focus today. Business development - not a "hand out" or "giveaway" - is the substance of the 8(a) program.

Furthermore, the Justice Department proposed reforms to affirmative action in federal procurement programs which are a critical component of the President's commitment to "mend, not end" affirmative action, will also help to improve the effectiveness of the 8(a) program and buttress its constitutionality.

It should be noted that nearly three years ago today, on September 22, 1993, my predecessor, former Administrator Erskine Bowles, asserted before you the SBA's intent to improve the 8(a) Program in terms of the quality of its business development assistance, oversight of program participants, SBA's work with other government agencies, and our internal management. I am pleased to tell you that significant improvements have been made:

- Improved management, monitoring, and control through a new, comprehensive management information system;
- Intensified monitoring of each firm's accomplishment of business development goals and compliance with competitive business targets by more comprehensive annual reviews of program participants;

- Reduced time that eligible firms must wait to receive program benefits by accelerating application processing time from an average of 208 days then to 90 days now, and re-engineering our application review process;

- Realigned organizational structure to integrate more fully the agency's government contracting initiatives into its program to assist disadvantaged firms;

- Re-focused 7(j) management and technical assistance to provide comprehensive assistance to 8(a) program participants through expansion of an executive education program;

- Reduced administrative paperwork burden on program participants by eliminating quarterly financial reporting requirements; and

- Improved program integrity by accelerating termination of ineligible firms. (To illustrate, more businesses have been removed from the program in the past two years than in the entire previous history of the program.)

Moreover, the U.S. Department of Justice is proposing other changes to the program.

Successes

Madam Chairman, before I address your specific issue, let me relate four of the MED program's successes. They demonstrate that the 8(a) program has produced many thriving companies which have created jobs and contributed to the nation's economic growth.

Integrated Systems Analysts, Inc. (ISA) of Arlington, VA, an engineering computer service firm established by C. Michael Gooden in 1980, was admitted to the 8(a) Program in 1982 and completed program participation in 1987, four years less than the currently allowable nine-year term. The company leveraged this access to Federal procurement to expand its annual revenues by a factor of ten

and increased its number of employees from less than ten to more than four hundred.

ISA, having exited the program nearly a decade ago, is an excellent example of successful transition from the sheltered environment of the 8(a) Program to the intensely competitive commercial and government marketplaces. In the past ten years, the firm's accomplishments have often been recognized: It has been included among Inc. Magazine's "500 Fastest Growing Companies" and Black Enterprise Magazine's "Top 100 Black Owned Businesses," and received the KPMG/Peat Marwick High Tech Entrepreneur Award and the Arthur Young/Venture Entrepreneur Award.

Dynacs Engineering Company, Inc., a current 8(a) participant founded by Ramendra P. Singh, entered the program in October 1989, and has been recognized by the National Aeronautics and Space Administration (NASA), the Boeing Company, the Governor of Florida, and the SBA for its commitment to excellence. Located in Clearwater, Florida, the business also has offices in Houston, Albuquerque, Pasadena, and Renton, Washington. Dynacs, engaged in engineering and scientific research, development and services, has developed complex technological innovations for NASA and is currently developing software to work with digital ink and paint used in commercial applications. Since 1993, sales have

almost tripled, and the company now employs 250 people nationwide. Dynacs' success reflects the support it received through the 8(a) program.

Lord and Company, Inc., of Manassas, Virginia, another business now in the 8(a) portfolio, was accepted in March 1991. It is a professional service firm, headed by Juan G. Cabrera, that specializes in the design, development, installation and start-up of microprocessor-based instrumentation, controls and monitoring systems. Certified as an Energy Savings Performance Contractor by the U.S. Department of the Army, it has more than 50 full-time and 16 part-time employees in five cities throughout the country. From 1993 to 1995, Lord and Company's revenues increased by more than 200 percent. It is now designing and implementing an important environmental control system for the Smithsonian Institution to protect the museums' collections.

Acorn Services, Inc., a current 8(a) participant based in Florham Park, New Jersey, entered the program in January 1993 and has succeeded in the very competitive food service management industry. Deborah Proctor, the business' president, contends that the "8(a) Program allowed my firm the opportunity ... to show people that we can deliver the agreed- upon services at the agreed-upon price in a timely and extremely professional manner, ... that corporate size, and owner's race and gender should not deter decision-makers from awarding contracts."

The company's 220 employees have performed ably on many contracts during the past three years, and Acorn's sales have grown by more than five hundred percent. Although fewer than half the program participants actually win contracts, Ms. Proctor's firm was awarded the first competitive 8(a) contract that it bid, an award from the U.S. Coast Guard. The 8(a) Program provided Acorn vital market access which once achieved, permitted the firm to demonstrate its competitiveness and ability to perform.

There are many more 8(a) success stories from all parts of the country. More than 6,000 small firms located across the United States are developing their competitive skills in the 8(a) program. Thousands of other firms have completed their nine-year term and have graduated from the program. Current 8(a) firms directly employ more than 157,000 people. Their multiplier effect results in considerable additional employment through subcontractors and suppliers. More than 80 percent of all 8(a) firms are located outside the Washington D.C., area. These firms receive about 75 percent of all 8(a) contract awards.

And, to address another frequent though inaccurate criticism of the program, it should be noted that the average net worth of program entrants is $60,000, exclusive of residence and ownership interest in the business, well below the $250,000 statutory maximum.

Real business development is being achieved through this program, measurable business-by-business in communities throughout our nation and in the human terms of aspirations and accomplishment, economic growth and new jobs.

Given these "success stories", the question can be asked whether the program's purpose has been fulfilled. The 8(a) program has kindled the entrepreneurial spirit among many who would otherwise lack access to business opportunity. It has helped reduce the barriers faced by socially and economically disadvantaged groups and has encouraged many individuals to go into business who otherwise might not have.

Based on the most recent data available from the Department of Commerce's Census Bureau, minority-owned businesses comprise 8.8% of the total business population, while minorities comprise 26.3% of the general population. This disparity, even greater in the Federal marketplace, is profound and argues powerfully for the continued need for 8(a) authority as a business development tool.

Contracting by minorities still represents a very small portion of total Federal procurement. In 1992, minority-owned businesses received only 2.9% ($5.7 billion) of the $200 billion of total Federal procurement, a figure which certainly is not representative of the country's minority population or business ownership.

This circumstance is consistent with Congress' finding in 1988 when it enacted PL. 100-656, determining that the need for the 8(a) program was just as valid then as it was at its inception in 1968.

SBA believes there is evidence that the 8(a) Program has indeed fostered business ownership by socially and economically disadvantaged persons, as intended by Congress. In 1995, 8(a) firms received $5.8 billion in Federal procurement awards. They had total combined revenues (including non-8(a) work) of more than $9.5 billion and paid more than $100 million in federal income taxes.

Yet the participation of minority-owned firms in Federal procurement remains comparatively small. Data from the General Services Administration's (GSA's) government-wide information from the Federal Procurement Data System indicates that aggregate minority-owned business participation in total Federal contracting amounted to only $11.2 billion, representing 5.5% of total procurement of $202 billion in Fiscal Year 1995. Total contract dollars awarded through the 8(a) Program represented approximately $6.4 billion, or 3.1% of Federal contracting dollar and 57% of the total minority participation.

Had 8(a) contracting opportunities not been available, minority-owned businesses might have received only $4.8 billion, which equates to 2.4% of total

Federal procurement dollars. Aside from the growth in 8(a) procurement from 1992 to 1995, minority business participation in the Federal marketplace increased only 0.7% over that period of time. You can understand what I mean, therefore, when I say we, as a nation, "still have a long way to go" in opening small business opportunities for all Americans.

Minority Enterprise Development Program Accomplishments

But this dramatic need should not excuse the 8(a) program from improvement. As I mentioned previously, SBA has meaningfully addressed concerns raised by past General Accounting Office (GAO) and Inspector General (IG) reports. First, SBA's inability to develop an effective, accurate management information system had been cited as a deficiency over the years that prevented the Agency from properly managing and evaluating the MED Program. Second, the Agency's failure to conduct comprehensive annual reviews of all portfolio firms to determine continuing program eligibility had been cited. Third, SBA's regulations permitting the abuse of competitive thresholds in award of indefinite delivery, indefinite quantity (IDIQ) contracts had been criticized. Fourth, SBA's previous failure to process program applications in a timely manner had been properly criticized. Fifth, SBA's failure to terminate firms which are no longer eligible had often been noted in past third-party reviews.

In the Clinton Administration, those of us charged with the privilege of managing this Agency have taken these criticisms very seriously and have, I believe, successfully addressed each of these shortcomings of the 8(a) program. Not only have significant management and streamlining improvements been made, but we have refocused the entire 8(a) and 7(j) programs to business development. Our minority economic development efforts have not been perfect; the work is not yet done; but we can demonstrate that 8(a) is being "mended," often in a very profound way that is consistent with both the program's objectives and the best interests of the American taxpayers.

Management Information Systems

A continuing criticism of SBA by GAO and the IG was SBA's failure to develop and implement an automated information system that would allow the agency to collect and evaluate information. In August 1994, SBA adopted a plan to complete automation of the MED program. Pursuant to this plan, in the fall of 1995, the agency implemented the Servicing and Contracts System/Minority Enterprise Development Central Office Repository (SACS/MEDCOR).

The system now used in Headquarters and all field offices is a comprehensive tool that enables SBA to monitor what kind of assistance is provided to whom, contracts awarded, business development progress, compliance

with statutory and regulatory requirements, and program performance. SBA is thereby able to measure program effectiveness and identify program vulnerabilities before they become problems.

During the past two months we have begun to use the information system to monitor district office compliance with statutorily mandated requirements to conduct business plan reviews. In FY 1997 we are committed to continue to monitor compliance on a quarterly basis.

Annual Portfolio Reviews

Annual reviews of the business plan for each program participant is essential: identifying market, management, and financial weaknesses, and recommending effective business development strategies. The failure to conduct annual business plan reviews was a serious program flaw.

Last year, for the first time in the 8(a) program's history, all SBA districts were assigned a goal to complete an annual review for every company in their portfolios. This goal was a critical component of each SBA District Director's performance review. As a result, 84% of all portfolio firms were reviewed during FY 1995, as compared to 57% in FY 1994, and it is expected that reviews will have been completed for all 8(a) firms this year.

Monitoring portfolio performance on a quarterly basis will now be possible because of the newly-implemented management information system. In FY 1997, to make the annual review process more efficient and the resulting data more accurate, we shall automate the review form and procedure, thereby simplifying our field staff's annual business plan reviews and improving their quality and consistency.

Indefinite Delivery, Indefinite Quantity Contracts

To increase the number of contracts available for competition, the "indefinite delivery, indefinite quantity" (IDIQ) contract "loophole" has been closed. Previously, IDIQ contracts with a minimum guarantee (not estimated) value below the competitive threshold were offered to SBA on a sole source basis. SBA relied on the minimum value guarantee in accepting these requirements into the 8(a) program. Subsequently, many of these contracts were allowed to grow, through issuance of task orders by contracting officers of agencies other than SBA, to amounts far in excess of the competitive threshold. As a result, SBA found that the estimates of contract quantities by contracting offices were unreliable. To remedy this problem, on June 7, 1995, SBA published regulations that used the total estimated value of the contract as the basis for determining if the contract should be let as an 8(a) competitive award, thus creating more opportunities for competition.

While SBA feels that these steps will assist in providing better distribution of 8(a) contracts, it does not believe they will guarantee equitable distribution of all 8(a) contracts, because it is up to each participant to market and seek out contract opportunities. The 8(a) program can only provide assistance necessary for participating firms to become competitive; it does not guarantee the award of contracts or economic viability. It does, however, in collaboration with other Federal agencies, offer management and technical assistance, as well as access to capital that will assist a company in its efforts to grow.

Application Processing

During FY 1996, the SBA made a concerted effort -- and successful -- to meet the 90-day statutory time frame for processing 8(a) applications. In the last three years, the average processing time has been reduced from 208 to 90 days. This reform is important because the more rapidly we process eligible firms into the 8(a) program, the sooner they can benefit from its business development assistance.

During FY 1997, applications will continue to be processed in this timely manner. Recent streamlining measures closed two duty stations and consolidated processing into three adequately staffed duty stations, and revised processing procedures to eliminate duplicative reviews. We are now actively investigating the feasibility of fully electronic filing and processing of applications for program

certification, as well as other process re-engineering to expedite application processing.

Termination of Ineligible Firms

We have taken to heart the President's injunction to "mend" this program. To maintain program integrity, and pursue realistic business development objectives with limited resources and limited contracting opportunities, it is essential that companies be screened for continuing eligibility and any determined to be ineligible be expeditiously removed from the program. Since the beginning of FY 1993, SBA has terminated 449 firms from the program for reasons of non-compliance. In this Administration, the SBA has processed more termination actions than in all prior years of this program cumulatively.

7(j) Business Development Assistance

To strengthen the business development potential of 8(a) participants, MED has expanded 7(j) Business Development Assistance, its executive development program targeted to the needs of 8(a) program participants as they transition from sheltered competition to open competition in Federal and commercial markets. Chief Executive Officers of 8(a) firms were invited to participate in SBA-sponsored Executive Education programs at Dartmouth College and Clark/Atlanta University, hosting 140 and 50 executives respectively. Based on excellent evaluations by

these program participants, new executive education programs have been funded by SBA at Howard and Loyola Universities.

Competitive Viability of 8(a) Firms

The percentage of firms still independently operating after leaving the program has improved since the enactment of Public Law 100-656 in 1988. Each year, pursuant to the law, SBA surveys firms exiting the program during the immediately preceding three years to determine their operational status. Notwithstanding slight yearly fluctuations, the overall trend is positive. Among firms exiting the program from 1988 to 1991, 48.5% reported that they were still independently in business. Among those exiting during the 1992 to 1995 period, 52% reported that they were independently operational.

The SBA is intensifying its efforts to assist disadvantaged businesses attain full competitive viability. The computerized management information system, annual review of business plans, district office goals for annual reviews, and continuing education will especially contribute to achieving this objective.

Impact of Previous Legislative Overhauls

Allow me now to respond to your question concerning the impact of previous legislative overhauls to improve management of the program.

In an attempt to correct alleged abuses that existed in the original program established by an Executive Order under President Nixon, Congress enacted Public Law 95-507 in 1978. Congress therein determined that the power to award Federal contracts could be an effective tool for development of business ownership among groups that own and control little productive capital. The law sought to shift the program's focus to business development and required small business owners participating in the program to be at least 51% owned and controlled by socially and economically disadvantaged individuals. The law also clarified that the primary beneficiaries of the program should be minorities, but it permitted non-minorities to establish eligibility.

PL. 95-507 created the SBA position of Associate Administrator for Minority Small Business and Capital Ownership Development (AA/MSB&COD) to administer the 8(a) and 7(j) management and technical assistance programs. To rectify inconsistent determinations of eligibility for the 8(a) program by the field offices, PL. 95-507 established specific eligibility criteria and required that all determinations be made by this individual.

P.L. 95-507 also served to expand the 8(a) Program. Yet even with P.L. 95-507, the program failed to develop a sufficiently viable number of disadvantaged firms that could successfully compete without continued government contract assistance. Consequently, Congress passed PL. 96-481 in October 1980, requiring SBA to negotiate program participation terms with fixed graduation dates for each program participant. Under this statute, a firm's participation in the program was

limited to an original term of up to five years, with a possible extension of two years. PL. 96-481 placed needed limitations on the maximum time a business could participate; but firms, to their detriment in terms of attainment of competitive viability, still relied too heavily on 8(a) contract support.

On November 15, 1988, President Reagan signed into law the "Business Opportunity Development Reform Act of 1988," PL. 100-656. This law provided for, among other things, competition for contracts among 8(a) program participants for procurement above certain contract dollar thresholds; a nine-year fixed participation term; a requirement for attainment of non-8(a) revenue at certain levels during program years five through nine; a direct loan program for 8(a) firms; and exemption from the Miller Act requirements for bonding and the Walsh-Healy Act requirements for status as a manufacturer or regular dealer. On the procedural side, the law also established a division of program certification and eligibility to process applications within 90 days; and required approval of business plans after certification but prior to award of any 8(a) contracts.

With PL. 100-656, Congress and President Reagan reaffirmed that the 8(a) program was a primary tool for improving opportunities in the Federal procurement process for small business concerns owned and controlled by socially and economically disadvantaged individuals and bringing such concerns into the nation's economic mainstream.

As previously stated, the percentage of firms still operating after leaving the program has improved following passage of PL. 100-656. The opportunities for competition among 8(a) firms have encouraged development of capacities and skills needed for competition without 8(a) support, and the required non - 8(a) revenue has fostered more aggressive self-marketing efforts.

Today, nearly 5,800 small businesses participate in this program, although fewer than half actually win contracts. Contrary to rhetorical claims, contracts are not "given" to select firms. In all cases, successful 8(a) firms pass technical evaluations to demonstrate their competence. These businesses are then required to self-market their capabilities to Federal customers in order to have the opportunity to negotiate a sole source contract. Should a firm successfully market itself, it is then required to submit a detailed proposal and negotiate a price for the contract.

In all 8(a) awards, the contracting officer certifies that the contract prices charged by the 8(a) firms a "fair and reasonable" price is assured, as the contracting officer is under no requirement to give the firm the contract in the absence of this condition being satisfied. All businesses awarded contracts must perform competitively in the provision of goods and services.

Evaluation of H.R. 3994

H.R. 3994 proposes to offer in place of 8(a) and 7(j) a training program which requires a potentially expensive and paperwork-intensive certification

process so that companies can receive the same benefits SBA currently offers all small business customers who meet the pertinent size standards. The Clinton Administration strongly opposes this bill because it would eliminate the 8(a) contracting program and the 7(j) business development training currently offered. Countless disadvantaged small business owners would be hurt, and the economic potential of a critical segment of America's population would have significantly less chance of being realized. SBA would recommend that the President veto any legislation that passes the Congress which is not consistent with his policy of mending, not ending, affirmative action.

Without offering anything meaningful to replace the 8(a) program, the proposed legislation would eliminate a business development program that has created and maintained jobs, strengthened the national, state and local economies, and increased the nation's tax base. The bill does not refer to data, analyses or other evidence to demonstrate that the problems which led Presidents Nixon and Reagan to establish and renew 8(a) contracting authority have now been overcome. It ignores, or repudiates, the fact that the 8(a) program, when combined with other business development tools provided or leveraged by the SBA for all small businesses, is a well-established mechanism that has resulted in success stories that have life- and community-changing consequences.

Under H.R. 3994, the businesses eligible for this program are the very smallest businesses: those that are less than 25% of the numerical size standard for their Standard Industrial Code (SIC code). These very small firms are currently

eligible for all of SBA's other programs without going through a certification process. The specific forms of assistance the bill proposes to offer these businesses are (1) business plan development assistance, (2) management and technical assistance, (3) financial assistance, (4) equity assistance, and (5) surety bond guarantees. Each of these forms of assistance is available now either directly through the SBA's offices or, more likely, through one of our private sector resource partners.

Let me put in perspective the total value of 8(a) contract awards during 1995. Two large business companies -- one in aerospace, the other in shipbuilding -- each received a sole source contract award that was approximately equal to the total value of all 8(a) contract awards for that year. Let me repeat the obvious in another way. The total amount of 1995 sole source contracts under the 8(a) program for all certified businesses owned by socially and economically disadvantaged individuals in the United States was approximately equal to just one sole source contract to each of the top two Federal contractors.

Additional statistics underscore the relative scale of sole source contracts for 8(a) businesses. During 1995, six firms each received one individual sole source contract award that was valued at approximately $1.5 billion. That is, each of these firms received a single contract that was roughly equal to half the size of new 8(a) contract awards for FY 1995. Last year, 8(a) firms received about $2.5 billion in new sole-source awards. Additions and modifications to existing sole source contracts represented about $2 billion in additional activity. Non-8(a) firms,

in comparison, received more then $63 billion in sole source awards.

Let me again emphasize that total 8(a) contract dollars of approximately $6.4 billion awarded during 1995 represented only 3.1 percent of total Federal contract awards. Only half of 8(a) program participants actually won contracts. Self-marketing and negotiation of reasonable prices were required in all instances. All were required to perform successfully in their provision of goods and services.

The SBA believes that the 8(a) program is necessary. But it does not condone any past abuses that have occurred. We have acted to correct them, and we are endeavoring to prevent abuses today and in the future. All of the aforementioned reforms and the upcoming Department of Justice proposals demonstrate this Administration's commitment.

The SBA recognizes that more must be done not only to "mend" this program, but to ensure equitable access to the benefits of the 8(a) program: to provide more opportunities to more Americans. We believe that the U.S. Department of Justice's proposal to reform affirmative action programs in Federal procurement in light of the Supreme Court's Adarand decision will further enhance the effective delivery of 8(a) program benefits by more accurately targeting contracting opportunities. We recommend that the forthcoming Justice Department proposals be given a chance to work.

During the past twenty-five years, SBA's use of its 8(a) contracting

authority has done much to assist socially and economically disadvantaged entrepreneurs. The 8(a) program has spurred creation of minority-owned businesses in all industrial sectors and unleashed entrepreneurial potential. It has fostered formation of capital and increased access to credit in the minority business community. The program also has provided vital employment opportunities for economically and socially disadvantaged employees.

We need to continue to improve this program. But while such great disparities continue in the levels of Federal procurement, the program should not be eliminated.

Testimony of
James Offord

before

the House Committee on Small Business
Washington, D.C.
September 18, 1996

Hearing on Proposed Reform of the 8(a) Program through H.R. 3994 - the "Entrepreneur Development Program Act of 1996"

My name is James Offord and I am retired from the Federal Government. I was employed by the former Department of Health, Education and Welfare (HEW). My job title was Contract Specialist and I was assigned the special task of being the 8(a) representative of HEW's Office of Human Development Services. In this capacity, it was my job to be the advocate for minority set-a-sides to firms designated as minority under the 8(a) Program.

Even though I had the "supposed" authority to select any procurement for minority set-a-side, I found it very discouraging to overcome the built-in prejudice of program managers and some of their supervisors.

As an example, when I informed program managers within my Department that I had decided to set-a-side a particular requirement for an 8(a) firm, management would come up with excuses as to why the minority 8(a) firm could not possibly perform the requirement or task. These 8(a) firms had been certified by the Small Business Administration (SBA). In some cases, the program manager would withdraw the requirement. In other cases, if the program manager found that the contract was over $25,000, that manager would try to convince me that the requirement was too large for

a minority-owned firm. When in part, small contracts are harder to perform, since the fixed course are the same as for a larger contract. Therefore, the profit margin is smaller and the risk to perform is difficult. It seems as though the mind set is that minority-owned firms should not be allowed to make larger profits. Even after contracts were awarded, some government contract managers would try to make the contract difficult to perform by changing specifications without a contract modification to compensate for increased work efforts.

This was done with veiled threats that if the minority contractor reported the increased work to the contracting officer, it would jeopardize any future contracts. Another way to avoid minority contractors was to keep modifying a contract with a non-minority firm using a unique specification that only the current non-minority firm possessed, which was not necessarily needed to the requirement of the end product. Management used this unethical method to eliminate the bidding process thereby eliminating fair and equal contracting opportunities for minority-owned firms who were able to bid competitively. These are some of the kinds of things that happened while I was a contracting specialist.

Summary

I believe that the SBA has done very little to protect the interest of minority-owned firms who were 8(a) certified and did even less to prevent management from denying fair and equal contracting opportunities to minority-owned firms who were able

to bid competitively. Enforcement of small business laws and regulations was not done because management had no intention of allowing fair treatment of minority-owned firms.

Recommendation

I recommend that a community task force be set up and given oversight of SBA and the 8(a) Program. This special task force could be allowed to function as an SBA counterpart while there is complete reorganization of the SBA. Or, if the 8(a) Program is eliminated, those who have never received contracts should be given a special exemption for contracts for a 2-year period of time. At this time, the system is so mismanaged and corrupt, the entire system may have to be shut down and started over again.

Testimony

by

Jeffrey Rosen

Legal Affairs Editor,

The New Republic

Associate Professor,

George Washington University Law School

House Committee on Small Business

September 18, 1996

My name is Jeffrey Rosen. I am the legal affairs editor of The New Republic, where I write about the Supreme Court and constitutional issues. I am also an associate professor at the George Washington University Law School, where I will soon be teaching constitutional law. I'm honored by your invitation to testify about the constitutionality of the 8(a) contracting program in light of the Supreme Court's decision in Adarand v. Pena.

I would like to begin on a note of caution. There are important disagreements among members of the Adarand Court -- most notably about the scope and significance of the deference that Congress should receive under its power to enforce Section 5 of the Fourteenth Amendment -- and these disagreements mean that confident predictions about the future would be irresponsible. Divining Justice O'Connor's wishes is never easy, least of all for Justice O'Connor herself. In the wake of Adarand, furthermore, I respect the Clinton administration's efforts to refine the 8(a) program, in the hopes of resolving constitutional difficulties. The broad categories of federal set-asides are mandated by Congress, after all; and unless Congress repeals the set-aside laws,

the President is constitutionally required to enforce them. Nevertheless, as a constitutional matter, I am not convinced that the administration's proposed reforms, for all their good intentions, can resolve the tensions between the 8(a) program and the Adarand decision.

Here is the nub of the constitutionality difficulty: Recent decisions suggest that the courts will only accept affirmative action programs in federal procurement if there is concrete evidence of discrimination against each of the relevant minority groups in each of the industries and regions with which the federal government does business. But the administration doesn't propose to collect this evidence with the precision that the courts are likely to require.

In its proposals to reform affirmative action last May, the Justice Department notes that courts have identified six factors in an attempt to define what is called the narrow tailoring prong of strict scrutiny:

(1) Whether the government considered race-neutral alternatives and determined that they would prove insufficient before resorting to race-conscious action; (2) the scope of the affirmative action program, and whether it is flexible; (3) whether

race is relied upon as the sole factor in eligibility, or whether it is used as one factor in the eligibility determination; (4) whether any numerical target is reasonably related to the number of qualified minorities in the applicable pool; (5) whether the duration of the program is limited and whether it is subject to periodic review; and (6) the extent of the burden imposed on nonbeneficiaries of the program.

The administration, to its credit, has frankly conceded that these constitutional tests call into question at least one federal procurement program, the so-called "rule of two," under which contracting officers can limit bidding on particular contracts to minority firms only. Remember how the "Rule of Two" operated in practice. The State of New Mexico is about 50 percent Hispanic American, and yet the Department of Defense, in its effort to satisfy national "goals" set by the Small Business Administration, set aside virtually all of its road-building contracts at the White Sands military base, the largest military base in the country, for minority-owned construction firms.

It is easy to recognize the Rule of Two as the antithesis of narrow tailoring: race is the sole factor in eligibility; numerical targets, which

amount to 100% set asides, have no relation to the availability of qualified minorities; and the burden on the excluded non-minorities -- complete exclusion -- couldn't be more extreme. Faced with likely defeat in court, the Clinton administration announced in October, 1995, that it would repeal the rule-of-two. But the administration then announced that the Department of Defense would continue to set-aside the same contracts for the same minority firms under a panoply of different federal programs, most notably the 8(a) program, whose constitutionality it continues to defend.

In many respects, the 8(a) set-asides, which the administration defends, are analytically indistinguishable from the "rule of two" set-asides, which the administration repealed. Both programs insulate certain racial groups from "competitive consideration" with other racial groups, using race as the decisive factor rather than as a plus factor in assigning public benefits, thus violating a distinction that Justice O'Connor has found crucial. And both programs are employed to meet federal "goals" that often have no connection to discrimination suffered by particular minority groups in particular regions of the country. Because the federal government makes no attempt, in establishing its annual "goals," to account for the

availability of minority firms in a particular industry or geographic location, the only way for agencies to meet their goals is to concentrate their minority contracting in certain fields, such as construction, where minority-owned firms actually exist.

Tacitly acknowledging that the 8(a) program, in its current form, can't survive close judicial scrutiny, the Justice Department proposes to reform it. The administration proposes to set limits, or "benchmarks," for each industry with which the federal government does business. According to the proposals, "Each industry benchmark limitation will represent the level of minority contracting that one would reasonably expect to find in a market absent discrimination or its effects." The administration proposes to use census data to determine the capacity of firms operating in each market that are owned by available and qualified minorities. This figure would then be adjusted upward to reflected "the estimated effect of race in suppressing minority business activity."

But the figure that the administration seeks is metaphysical, not empirical, and no state has convincingly calculated it. In Texas, for example, the state tried to suggest that low percentages of self-employed minorities, and high percentages of

discrimination lawsuits filed, might indicate that minority business formation had been suppressed by discrimination. But the General Services Administration refused to accept the claim, conceding that business formation may be affected by cultural factors or personal choices that have nothing to do with discrimination.

The most obvious weakness of the administration's proposal is its refusal to reexamine the Achilles heel of the 8(a) program: its reliance on a list of groups that are presumed to be socially and economically disadvantaged, even though neither Congress nor the Small Business administration has ever examined any evidence of discrimination against many of the groups on the list. To satisfy the standards that Justice O'Connor articulated in the Croson case, the administration would have to undertake an arduous empirical task indeed: looking for evidence of discrimination against each group or sub-group included in the current set-aside program for each service that the federal government purchases in every state in the nation. But the Justice Department has decided not to do this. "Members of designated minority groups seeking to participate in SDB and 8(d) programs will continue to fall within statutorily mandated presumptions of

social and economic disadvantage," says the Justice Department report.

In practice there simply isn't evidence of systematic discrimination against many of the groups on the federal list. In the 1980s, for example, the Small Business Administration decided, without examining any empirical evidence of discrimination, to add many recent immigrant groups to the list, such as Asian Indians, Tongans and Indonesians. Even if the courts decides to accept post-hoc evidence of discrimination -- and this question remains open -- it would be difficult to prove that each of these groups has been in the country long enough to have been victims of historical discrimination, or to be suffering from its current effects.

Recent court decisions have made the administration's task more daunting still. On July 31, the U.S. Court of Appeals for the Third Circuit, in Contractor's Association of Eastern Pennsylvania v. City of Philadelphia, struck down the City's contracting goals for American owned businesses. Judge Stapleton, writing for the Court, distinguished between three separate kinds of discrimination: discrimination by prime contractors against subcontractors; discrimination by contractors associations against prospective members; and discrimination by the City against

prime contractors. There may have been evidence of discrimination in the award of prime contracts, said the court; but it declined to answer that question definitively because Philadelphia had created a 15% set aside for subcontractors. And this, the court held, is not a narrowly tailored remedy for discrimination in the award of prime contracts.

The Philadelphia decision bodes ill for the administration's effort to save the 8(a) program, which is administered, after all, not by prime contractors, or contractors associations, but by the federal government itself. So the only discrimination for which the 8(a) program could confidently be said to provide a narrowly tailored remedy is discrimination by government employees in the award of government contracts. But no one has ever attempted to produce evidence that government officers have been, since the adoption of the 8(a) program at least, discriminating against minority owned prime contractors.

The administration proposes an empirical project of great complexity and expense; but to satisfy the Adarand standards, the project would have to be far more elaborate still. It would have to look for evidence of discrimination in the manufacturing and sale of each industry and each region in which the federal government does business. But all sorts of

questions remain. Would discrimination in manufacturing and sale of computers justify a bid preference in manufacturing and sale of paper? Does discrimination in South Carolina justify a bid preference in Massachuetts?

And what about the administration's bold suggestion that most markets are national rather than regional? Doesn't this vary, in fact, from industry to industry? There is a national market for cars, perhaps, but surely not for roof repairs. Instead of examining minority firms' ability to perform "a particular service," to use O'Connor's words, the administration plans to lump a host of services, from roof-building to road-making, into the amorphous category of "construction," and create state-by-state "construction industry" goals. But the most recent court decisions make clear that evidence of discrimination against African American janitors can't be invoked to justify preferences for Hispanic guardrail makers.

Ultimately, the administration's proposals may be doomed in court by a simple fact: thanks, in part, to the success of the 8(a) program, minority business enterprises today seem to be (in the legally relevant sense) over represented, rather than underrepresented, in many aspects of federal procurement. In 1994, 25 percent of all federal

dollars awarded to small business went to minority small businesses, although minorities own 9 percent of businesses in the country. The administration tries to skirt this number by emphasizing, in its proposals, that minority businesses receive "less than 4 percent of all business receipts," but this is the wrong comparison. Most procurement dollars go not to small businesses but to huge Fortune 500 companies, such as Lockheed and Exxon, that have no ethnic corporate identity but are owned by shareholders of all races.

I'd like to close on the note of caution with which I began. As members of Congress deciding whether or not to repeal the 8(a) program, you have no obligation to engage in the mystical enterprise of reading judicial tea leaves. Instead, you surely have the right and the responsibility to make an independent constitutional judgment about whether or not you believe affirmative action in federal procurement, as it is currently administered, to be consistent with the requirements of the Equal Protection Clause. If you find yourself more convinced by the arguments of the four Adarand dissenters -- and these are powerful arguments, consistent with principles of judicial restraint -- then your constitutional concerns, of course, will

be less acute than if you are persuaded by the arguments of the Adarand majority.

SAS.
General Construction Contractor
1601 Society Court
Herndon,Virginia 20172-1969

September 17,1996

Congress of the United States
House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515

Dear Madam Chair:

First and foremost I would like to thank you for inviting me to testify at the hearing. I would like to share with you my experience since being approved in the 8(a) contracting program in October of 1992 .

I am a small business , who seems to be relegated to small contracts , that has barely afforded me a living , let alone in building my business . I had hope that the 8(a) program and set-a-sides would permit me to do larger contracts that would allow me to make sufficient profit and capitalize my company . I would like the Small Business Administration to help me acquire , at least , one contract so we can demonstrate our skills and capabilities to assure government agencies that we are a serious and dependable .

During my first year the Small Business Administration calculated that I could safely complete 8(a) contracts up to hundred thousand , the second year they calculated two hundred thousand . However , despite their increasing confidence in my ability to handle larger contracts they did not help me to secure a single contract . As a result , I spent a great deal of time satisfying their administrative requirements for no return .

Prior to being approved in the 8(a) program I had been competitively bidding and was awarded a federal contract with General Services Administration for twenty thousand dollars . Since being in the 8(a) program , I have been awarded several contracts non 8(a) ranging from twenty five hundred to ten thousand dollars .With the Small Business Administration having approved me at hundred thousand support level , I had hope that they would had help me to get these types of contracts with agencies like General Services Administration .

However since my approval with the Small Business Administration I been self marketing and requesting search letters be sent out to various federal agencies for larger contracts . The Small Business Administration again have done nothing to help me . So I am still excluded even with General Services Administration .

The 8(a) contracting program would be good if implemented . My views on the proposed

legislation and the effects H.R. 3994 are that it still does not help me because I have utilized all of the counseling programs that have been made available to me for the development of becoming a sucessful entrepreneur , however it seems to me the real issues here is not whether the program will work for me , why the program officers at the Small Business Administration seems determine not to help me .

Sincerely,

Shirley A. Stewart Veal

Shirley A. Stewart Veal, President

JAN MEYERS, KANSAS
CHAIR

JOHN J. LAFALCE, NEW YORK

Congress of the United States
House of Representatives
104th Congress
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6315

October 10, 1996

The Honorable Philip Lader
Administrator
Small Business Administration
409 3rd Street, SW
Washington, D.C. 20024

Dear Administrator Lader:

Thank you for your participation and testimony in the Committee's September 18, 1996, hearing examining the 8(a) Program and "The Entrepreneur Development Program Act of 1996," (H.R. 3994). I am grateful for your continuing interest in the program's performance.

As we complete the Committee's review of the 8(a) Program for the 104th Congress, I would appreciate an official response to the following questions:

1) What percentage of firms in each SIC two-digit category are encompassed in SBA's current definition of a small business?

2) What percentage of the adult members of each presumptively-eligible group are excluded by the SBA's $250,000 and $750,000 definition of economic disadvantage?

Your timely response to this request will be personally appreciated and most helpful in completing the Committee's work for this session.

If you have questions about this request, please contact Craig Orfield of the Committee staff at 225-5821. Thank you for your assistance.

Sincerely,

Jan Meyers
Chair

U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

Honorable Jan Meyers
Chairman
House Committee on Small Business
2361 Rayburn Building
Washington, D.C. 20515

Dear Chairman Meyers:

I am pleased to respond to the questions raised in your letter of October 10, 1996 to Administrator Phil Lader, as part of the Committee's review of the 8(a) program during the 104th Congress.

Question 1. What percentage of firms in each SIC two-digit category are encompassed in SBA's current definition of a small business?

To remain active in the 8(a) program, each firm must be "small" per the U.S. Small Business Administration's size standard for its SIC Code. If a program participant is found to be other than small, it is removed from program participation via graduation or termination, as appropriate. Attached you will find a chart detailing the percentage of 8(a) firms in each SIC two-digit category encompassed by SBA's definition of a small business, as of October 31, 1996.

Question 2. What percentage of the adult members of presumptively-eligible group are excluded by the SBA's $250,000 and $750,000 definition of economic disadvantage?

The U.S. Small Business Administration maintains a data base that includes net worth information regarding only the principles of: (1) applicant firms, and (2) firms certified for program participation. It does not maintain general net worth data regarding the general population, nor members of groups presumed to be socially disadvantaged. Such information may be available, however, from the Bureau of the Census, or the Internal Revenue Service.

If you or your staff have further questions; or require clarification of these responses, do not hesitate in contacting me at 202-205-6412.

Sincerely,

Calvin Jenkins
Associate Administrator for
Minority Enterprise Development

Enclosure

Percentage of 8(a) Firms in Each 2-Digit SIC Code Category

2-Digit SIC Code	Number of Firms	Percent of Portfolio
00	4	0.07
01	0	0.00
02	0	0.00
03	0	0.00
04	0	0.00
05	0	0.00
06	0	0.00
07	67	1.18
08	44	0.77
09	0	0.00
10	0	0.00
11	0	0.00
12	0	0.00
13	3	0.05
14	0	0.00
15	590	10.39
16	212	3.73
17	637	11.22
18	0	0.00
19	1	0.02
20	13	0.23
21	0	0.00
22	2	0.04
23	28	0.49
24	6	0.11
25	7	0.12
26	11	0.19
27	34	0.60
28	25	0.44
29	3	0.05
30	10	0.18
31	1	0.02
32	2	0.04
33	4	0.07
34	83	1.46
35	102	1.80
36	76	1.34
37	47	0.83
38	22	0.39
39	12	0.21
40	0	0.00
41	5	0.09
42	58	1.02
43	0	0.00
44	1	0.02
45	13	0.23
46	0	0.00
47	39	0.69
48	52	0.92
49	25	0.44

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Percentage of 8(a) Firms in Each 2-Digit SIC Code Category

2-Digit SIC Code	Number of Firms	Percent of Portfolio
50	261	4.60
51	88	1.55
52	6	0.11
53	2	0.04
54	0	0.00
55	3	0.05
56	2	0.04
57	18	0.32
58	31	0.55
59	6	0.11
60	0	0.00
61	1	0.02
62	1	0.02
63	3	0.05
64	7	0.12
65	30	0.53
66	0	0.00
67	0	0.00
70	2	0.04
71	0	0.00
72	20	0.35
73	1375	24.22
74	1	0.02
75	7	0.12
76	34	0.60
77	0	0.00
78	25	0.44
79	2	0.04
80	16	0.28
81	8	0.14
82	21	0.37
83	18	0.32
84	0	0.00
85	0	0.00
86	0	0.00
87	1411	24.85
88	1	0.02
89	37	0.65
92	0	0.00
93	0	0.00
94	0	0.00
95	2	0.04
96	0	0.00
97	0	0.00
98	0	0.00
99	0	0.00
Total	5678	100.00

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